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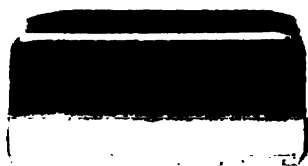
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IN

CASES RELATING TO THE PUBLIC LANDS

FROM JULY 1, 1837, TO JUNE 30, 1838.

VOLUME VI.

EDITED BY S. V. PROUDFIT.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.

1888.

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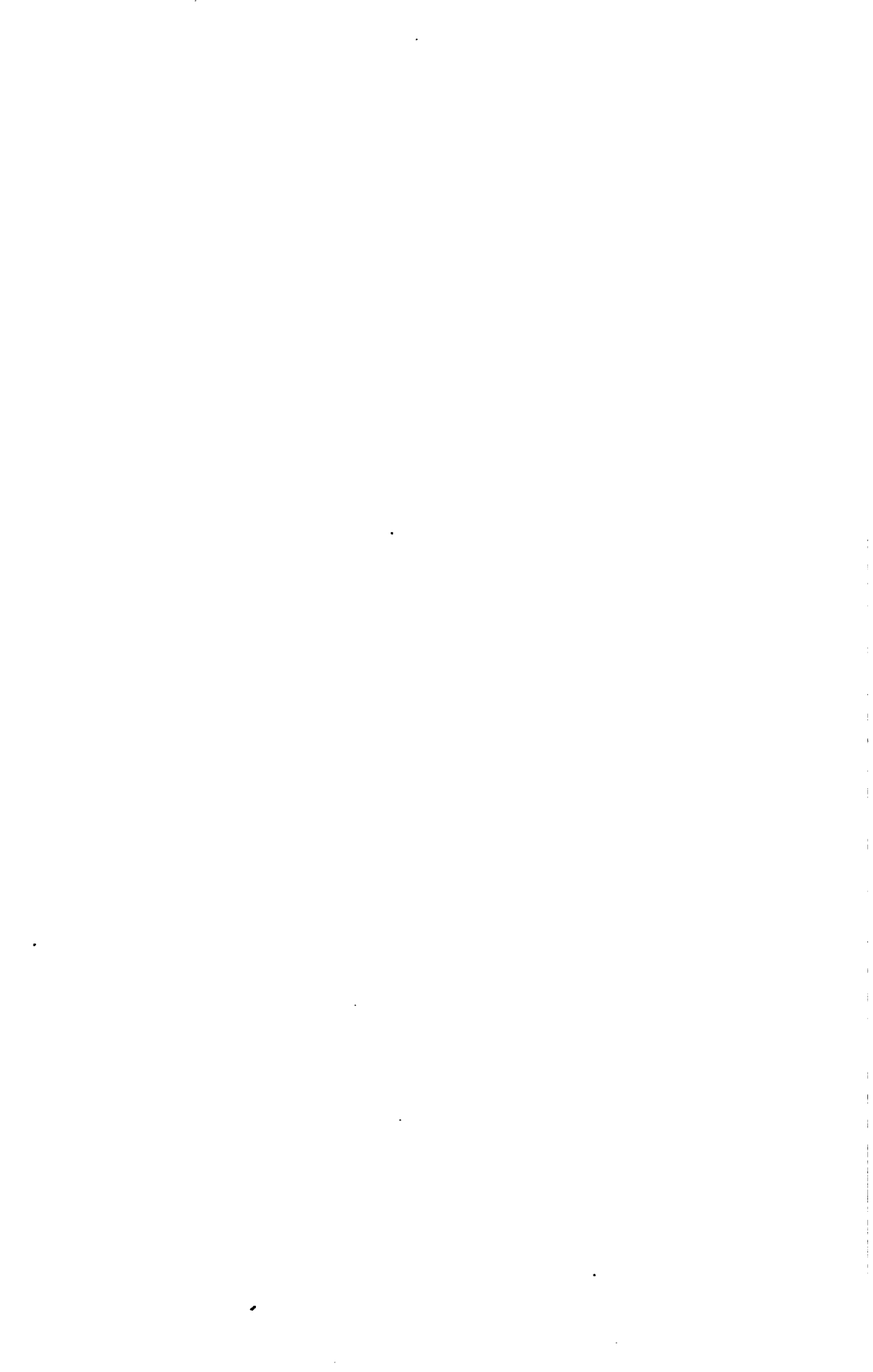
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DECISIONS

RELATING TO

THE PUBLIC LANDS.

DESERT LAND ENTRY—RELINQUISHMENT.

SEARS v. ALMY.*

When the relinquishment of a desert land entry is filed in the local office the entry should be at once canceled, and the land thereafter held open to settlement and entry without further action.

Entry not invalid because allowed outside of office hours.

Acting Secretary Muldrow to Commissioner Sparks, June 3, 1887.

On the 16th of June, 1877, George A. Black made desert land entry of the NW. $\frac{1}{4}$ and SW. $\frac{1}{4}$, the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, and the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, of Sec. 21, the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 28, T. 1 N., R. 2 W., Salt Lake district, Utah Territory. Said Black failed to reclaim the tract within the period prescribed by law, and on September 25, 1880, your office called upon Black to show cause why his said entry should not be canceled. To this demand Black made no reply, and your office, for years, took no further action. Black's failure to reclaim being a fact visibly evident, Mary E. Almy, for the purpose of clearing the record of an abandoned and expired entry in the least expensive manner, early in 1884 purchased of Black the relinquishment of all his right, title, and interest in the tract, for the sum of fifty dollars. Said relinquishment was forwarded to your office, which thereupon, May 20, 1884, canceled Black's entry.

Mrs. Almy was represented by attorneys in Washington, who notified her of such cancellation by telegraph; and from the receipt of such information she was continually on the alert to become the first applicant for the land after your office letter of cancellation should reach the local office—which it did June 21, 1884. What followed is tersely told by the register in his letter to your office (September 9, 1885):

The letter arrived with the evening mail about eight o'clock. After distribution of the mail I was accosted on the street and asked to go

*Not reported in Volume 5.

to the office and swear claimant and witnesses to entry papers. Having never before refused to accommodate claimants by allowing them to execute their papers out of office hours, I did so. . . . The papers were left in the office and not actually recorded and the certificates signed until the following morning. The clerk in recording the entry did so as of the date when the papers were sworn to. . . . The following morning Mr. Simmons applied to make an entry. His application was refused on the ground of prior application by Almy. . . . The papers in this case were received in accordance with the established practice of my predecessor, and followed until the instructions to Inspector Hobbs (11 U. L. C., 178,) prohibited the same. The adverse claimant or any other person would have received the same accommodation accorded to claimant Almy had there been such a request and application.

Mr. Simmons, mentioned in the register's letter, was attorney for Isaac Sears, in whose behalf he applied to make entry. It appears that he also had for days been watching for the arrival of the letter of cancellation, and had inquired regarding it at the local office daily. Upon the refusal of his application on the morning of June 3, as above set forth, Sears appealed to your office, on three grounds: (1) That Almy's application, made in the evening, after all other applicants had been dismissed until the next day, was not a legal application; (2) That the entry papers did not specifically and correctly describe the land comprised in said entry (failing to specify whether it lay in Township 1 "N." or 1 "S."); (3) That one of the witnesses was the husband of the applicant, and therefore not a "disinterested witness."

Your office decision of October 2, 1885, says:

Office letter to F. D. Hobbs, referred to by the register, does not establish a new rule of practice, but is an enunciation of one long settled, and both wholesome and necessary, viz., that an application made after office hours is not legal. Said appeal is accordingly sustained, and said entry held for cancellation.

In the case of *Sayer et al., v. The Hoosac Consolidated Gold and Silver Mining Company*, your office held (March 30, 1878), that "officers are not expected nor required to transact official business after office hours." But on appeal of said case, this Department, July 17, 1879 (6 U. L. O., 73), overruled said decision, holding that while it was true that officers are not expected nor required to transact business out of office hours, yet there is no law of the United States prohibiting them from doing such business, and in case they do, their acts are valid. Certainly until the letter of instructions to Inspector Hobbs (September 4, 1884,) the above mentioned departmental ruling was in force, and justified the register in executing the entry papers in the case at bar.

As to the second ground of appeal, it is not claimed that the failure to place the letter "N" after "Township 1" misled Sears or in any way imperiled his interests. It was an oversight of the register's, corrected as soon as discovered.

Thirdly: that one of Mr. Almy's witnesses was her husband does not appear upon the record; it is only alleged in the argument of counsel. The entry on its face is valid.

It should be observed that this is not a case of contest. No notice of contest has ever issued. Whether or not Almy's entry might if contest were instituted prove to be voidable, certainly it is not void. In my opinion, its existence as a prior application justified the local officers in refusing the later application of Sears.

Counsel for Sears pleads his equities, claiming that in this case, by the rejection of his application to enter, "an absolute wrong has been committed, an injustice of the most glaring and flagrant character." The matter of equities being suggested, it may not be amiss to direct attention to those of Almy. She took the initiative, months before Sears appears in the record in any shape, in securing the cancellation of the entry for her own benefit, by purchasing for fifty dollars the relinquishment of Black. She employed counsel in Salt Lake City to attend to her case; also counsel in Washington to follow it up closely in your office and before the Department, who also kept her informed by telegraph of the status of the case, and the exact date of the mailing of your order of cancellation. Meanwhile Sears learned that Almy had secured the cancellation of the entry, and determined that on the arrival of the order of cancellation he would forestall her in obtaining possession of the land. According to the statement of his attorney, he, for several days, "both personally and by counsel, watched the arrival of the letter of cancellation," which she had been instrumental in procuring, "and had been first at the office after each mail arrived during that period. . . . He was so earnest and diligent that he appeared almost too persistent and even obtrusive in making continually repeated inquiries at the office as to the arrival of the cancellation. So much was this the case that . . . he verily believes if said appellant had not taken the advantage she did, and if the officers had not permitted the said entry after office hours, and received said money as aforesaid, respondent would have made the entry in question to the exclusion of said applicant." Had he succeeded in his attempt to reap the reward of Almy's prior activity, vigilance, and heavy cash expenditure, I would be willing to admit that "an injustice of the most glaring and flagrant character had been perpetrated; but having been thwarted in his attempt, I can see no ground for complaint either on the score of law or of equity.

The conclusion reached herein is strongly supported by the decision of this Department, August 13, 1884, in the case of *Fraser v. Ringgold* (3 L. D., 69), which held (quoting from syllabus) that "one who contests and procures the cancellation of a desert-land entry has the preferred right to enter the tract under the act of May 14, 1880, inasmuch as . . . this class of entries, if not embraced by the letter, are within the reason and purpose of the statute." In the case at bar, Almy did not contest the entry, for the simple reason that at that time it had not been decided, as has since been decided in said case, that desert-land entries, like pre-emptions, "may be held subject to the rules

of practice in the matter of hearings and contests." In said case it is held further that a desert-land entry—

Is under a statute looking to reclamation and permanent improvement, upon which proof of good faith is necessary to complete the title, and on failure of which it ought to be forfeited, where the same policy of inducement to contest, of speedy restoration in case of relinquishment and of security of settlement after restoration, ought to prevail, as in case of lands liable to restoration technically within the very words of the statute. It is also an entry which ought to be included in such a classification as will bring it within the rules of practice relating to contests and administrative investigation, without the necessity of making special rules.

Hitherto desert-land entries have been under a "special rule" as regards relinquishment—the relinquishment being forwarded to your office, which thereupon transmits to the local office an order of cancellation. The embarrassment, vexation, and danger of great injustice, consequent upon such a course, clearly appears in the case at bar. If, as the Fraser-Ringgold case decides and directs, desert-land entries are subject to the provisions of the act of May 14, 1880 (21 Stat., 140), the first section of said act provides—

That when a pre-emption, homestead, or timber-culture claimant shall file a written relinquishment of his claim in the local land office, the land covered by such claim shall be held as open to settlement and entry without further action on the part of the Commissioner of the General Land Office.

Applying the ruling in the Fraser-Ringgold case to the case at bar, it would seem that the proper practice would have been for the local officers to have canceled Black's entry at once when the relinquishment was presented by Almy, and allowed her then and there to make entry of the tract.

For the reasons herein given, I reverse your office decision holding Almy's entry for cancellation.

ACTION ON FINAL PROOF—RES JUDICATA.

UNITED STATES v. BAYNE.

There is no authority for the Commissioner of the General Land Office to review a final decision of his predecessor, but the Department, by virtue of its supervisory authority, may correct any error apparent on the record.

Secretary Lamar to Commissioner Sparks, July 1, 1887.

I have considered the appeal of William H. Bayne from the decision of your office, dated January 20, 1886, rejecting his final proof and holding for cancellation the final certificate No. 31 issued upon homestead entry No. 4467 of the NE. $\frac{1}{4}$ of Sec. 35, T. 121, R. 63 W., 5th P. M., on January 9, 1884, at the Aberdeen land office, in the Territory of Dakota.

The record shows that said homestead entry was made May 7, 1881. On November 19, 1883, claimant gave notice by publication of his intention to make final proof in support of his claim before the register and receiver of said land office on January 9, 1884. The final proof was accepted by the local land officers, and final certificate issued as aforesaid. On November 15, 1885, your office suspended said proof, because it did not show sufficient residence upon the land. Thereupon the claimant furnished supplemental proof, which your predecessor considered on March 18, 1885, together with the original proof, and held that the same showed "a bona-fide intention to comply with the law, and the same being in fact a practical compliance therewith, the entry is relieved from suspension and will be approved for patent." The local land officers were directed to "notify the claimant accordingly."

On January 20, 1886, your office, without any reference to the former decision of your office holding said proof sufficient, and with no new or other evidence than that upon which said decision was rendered, rejected said proof and held the final certificate for cancellation, "for the reason that the claimant did not properly describe the land (range not given) for which proof was made in his publication of notice, and also for the reason that by the proof submitted he fails to establish his good faith in the matter of residence, improvement and cultivation."

The final proof shows that claimant entered upon said tract May 1, 1881, and established his residence thereon same day; that his improvements consist of a frame house sixteen by twenty two feet, a stable, good well, seven acres broken and cultivated—all valued at \$250. With said proof are filed copies of certificates of discharge from the army of the United States, showing that claimant enlisted in Co. D, 28th Reg., New York Volunteers, November 12, 1861, to serve two years, and was discharged from service for disability on May 22, 1862; also that he enlisted in Co. C, 130th Reg., Ohio National Guards, on May 2, 1864, to serve one hundred days, and was discharged September 22, 1864.

Your office decision of March 18, 1885, held that the records of the War Department—which govern your office in all cases of army service—show that Bayne enlisted in said regiment November 12, 1861, for the unexpired term of eighteen months, and that he was discharged for disability May 22, 1862; that he subsequently served in the army four months and twenty days, making a total army service of one year, ten months and twenty days, "which added to his term of residence of two years, eight months and eight days gives a total of four years, six months and twenty-eight days, lacking five months and two days of the five years required by law."

It further appears that your office directed the local land officers to advise the claimant that, "when he showed a substantial compliance with the law by residing a sufficient length of time upon the land to cover the deficiency, he would be allowed to show that fact, without

further formality, by his own affidavit, corroborated by two witnesses." In response to said advice, claimant filed an affidavit, duly corroborated, setting forth that he made said entry in good faith; that he fully believed that he was entitled to credit for two years' residence on account of his enlistment in said New York Regiment, and one hundred and forty-three days on account of his service in said Ohio Regiment; that he resided upon said tract from May 1, 1881, to February 9, 1884, one month after making entry; that being out of money, claimant went to Chicago, Illinois, in search of work; that in the spring of 1884 he hired a person to go upon said tract and put in a crop; that the person so hired resided upon said land for three months, when claimant returned and lived on the land for three months; that claimant has not alienated the land. Upon this showing, your office held that the claimant has shown good faith and a practical compliance with the law, and that said entry "will be approved for patent." This decision became final, so far as relates to the action of your office, upon the expiration of sixty days from notice thereof. Rules of Practice No. 112 (4 L. D., 49).

It has been the uniform ruling of this Department that one Commissioner of the General Land Office has no authority to review a decision of his predecessor that has become final. *Eben Owen et al.* (9 C. L. O., 111). The Department, however, by virtue of its supervisory authority may correct any error apparent on the record. *Lee v. Johnson* (116 U. S. 48).

The evidence fails to show bad faith upon the part of the claimant, which would warrant the cancellation of said entry. It appears that the number of the range was not given in the published notice. For this defect, the entry will be suspended and the claimant will be required to make new proof in accordance with the law and regulations of the Department.

The decision appealed from is modified accordingly.

RAILROAD GRANT—WITHDRAWAL—ACT OF APRIL 21, 1876.

NORTHERN PAC. R. R. CO. v. DUDDEN.

A homestead entry made subsequently to the filing of the map of general route of the Northern Pacific, but prior to the receipt of notice of withdrawal thereunder, is protected by the act of April 21, 1876.

Secretary Lamar to Commissioner Sparks, July 1, 1887.

By letter of October 7, 1884, the local officers at Helena, Montana, forwarded to your office the application of the Northern Pacific Railroad Company to contest cash entry No. 1604, made under act of June 15, 1880, by Bernhard H. Dudden, for the NW $\frac{1}{4}$ of NE $\frac{1}{4}$, Sec. 27, T. 4 N., R. 10 W.

The tract is within the limits of a withdrawal ordered April 22, 1872, upon the map of general route filed February 21, 1872, and also within forty miles of the line of road as shown by the map of definite location filed July 2, 1882.

The records show that said Dudden made homestead entry of said tract April 26, 1872, which was canceled September 11, 1879, and that on August 26, 1884, he made cash entry as aforesaid under the act of June 15, 1880.

Your office, by letter of March 17, 1886, rejected the application of the company and its claim to the tract. The company appealed.

Notice of the withdrawal on general route was not received at the local office until May 5, 1872. It will be observed the entry was made prior to that date, on April 26.

The land at said last mentioned date was properly subject to entry. For the act of April 21, 1876, provides:

That all pre-emption and homestead entries or entries in compliance with any law of the United States, of the public lands, made in good faith by actual settlers upon tracts of land of not more than one hundred and sixty acres each within limits of any land grant prior to the time when notice of the withdrawal of the lands embraced in such grant was received at the local land office of the district in which such lands are situated, or after their restoration to market by order of the general land office, and where the pre-emption and homestead laws have been complied with, and proper proof thereof have been made by the parties holding such tracts or parcels, they shall be confirmed, and patents for the same shall issue to the parties entitled thereto.

Sec. 2. That when at the time of such withdrawal as aforesaid valid pre-emption or homestead claims existed upon any lands within the limits of any such grants which afterward were abandoned, and, under the decisions and rulings of the Land Department, were re-entered by pre-emption or homestead claimants, who have complied with the laws governing pre-emption or homestead entries and shall make the proper proofs required under such laws, such entries shall be deemed valid, and patents shall issue therefor to the person entitled thereto. (19 Stat., 35.)

At the time of the receipt of notice of said withdrawal on general route by the local office, a valid homestead claim existed on the tract. But nine days had passed since the entry was made, and claimant was not obliged to establish residence, or perform any other act on the land at that time, for he had six months from entry within which to establish residence. At the date of receipt of such notice a homestead claim, capable of ripening into patent, had attached to the land. The tract was therefore excepted from the withdrawal on general route.

It is true the court in the case of *Buttz v. Northern Pacific Railroad Company* (119 U. S., 55), held that "when the general route of the road is thus fixed in good faith, and information thereof given to the Land Department by filing the map thereof with the Commissioner of the General Land Office, or the Secretary of the Interior, the law withdraws from sale or pre-emption the odd sections to the extent of forty miles on each side."

In that case, however, said act of April 21, 1876, was not before the court, nor was it necessary to the decision therein.

It is well settled that all acts *in pari materia* are to be construed as one. Applying that maxim to the acts here under consideration, it seems necessary to conclude that, upon filing of the map of general route, "the law withdraws from sale or pre-emption the odd sections," subject however to the provisions of the act of April 21, 1876.

In this view it is not in conflict with the decision in the Buttz case to hold that the land in question was not affected by the withdrawal on general route.

The right to purchase under the act of June 15, 1880, excepted the tract from the withdrawal on definite location. *Burt v. Northern Pacific Railroad Company* (3 L. D., 490); *Holmes v. N. P. R. R. Co.* (5 L. D., 333); *McLean v. N. P. R. R. Co.* (5 L. D., 529).

Said decision, for the reasons herein, is affirmed.

HOMESTEAD ENTRY—COMMUTATION PROOF.

JAMES H. SHEPARD.

The cancellation of a commutation cash certificate terminates all rights under the original entry.

On the rejection of commutation proof, with the right to submit new proof, it may be presented at any time within the lifetime of the original entry.

Secretary Lamar to Commissioner Sparks, July 1, 1887.

I have considered the appeal of James H. Shepard from the decision of your office, dated October 16, 1885, rejecting his final commutation proof on homestead entry No. 2489 of the SW. $\frac{1}{4}$ of Sec. 9, T. 114 N., R. 77 W., made March 24, 1883, upon which proof was made April 30, 1885, before the clerk of the district court for Sully county, in the Territory of Dakota, and final certificate No. 12,969 was issued on May 8, 1885, by the local land officers at Huron, in said Territory.

Your office rejected the final proof offered, upon the ground "that his residence upon the land has not been such a continuous actual bona-fide residence as contemplated by law." The local officers were directed to advise the claimant that his cash certificate will be allowed to stand, and he will be permitted within sixty days to make new and satisfactory proof of residence and cultivation, and that in default of such proof, the cash certificate will be canceled, leaving the original entry to be disposed of in regular course of business.

This action of your office was clearly erroneous. If the cash certificate be canceled, then the homestead entry must be canceled. This was expressly ruled in the case of *Greenwood v. Peters* (4 L. D., 237). If the proof be rejected and the applicant allowed to make new proof, then, under the law, he can do so at any time during the lifetime of his entry. *Sec. 2301, R. S.*; *Thomas Nash* (5 L. D., 608).

On June 4, 1886, your office transmitted to this Department the application of one William H. Brown, setting forth under oath that said entry was illegal and made for speculative purposes, and asking that a hearing be ordered to ascertain the truth of his allegations. Mr. Brown's affidavit is corroborated, and it would seem eminently proper that a hearing be had upon the charges contained therein.

The decision of your office is modified.

PRACTICE—APPLICATION FOR REVIEW.

WELDON v. McLEAN.

Where the facts upon which a motion for new trial is based are known to the complaining party while the local office has jurisdiction, such motion should be filed in that office.

It is not sufficient for the applicant to state that he did not know of the testimony in time to produce it for the trial; it must appear that he could not have discovered it by reasonable diligence.

Secretary Lamar to Commissioner Sparks, July 1, 1887.

I have before me the application of Jared A. Weldon for a review of my decision, dated October 1, 1886, in the case of said Weldon v. Addison McLean, involving the S. $\frac{1}{2}$ of SW. $\frac{1}{4}$, NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ and SW. $\frac{1}{4}$ of SE. $\frac{1}{4}$, Sec. 29, T. 1 S., R. 3 E., Humboldt, California.

McLean offered proof on his declaratory statement for said tract, and Weldon filed protest and applied to purchase the tract as timber land under act of June 3, 1878 (20 Stat., 89).

Said decision directed the cancellation of said filing, on the ground of fraud, and rejected the application to purchase, on the finding that the tract was not timber land in the purview of said act.

The present motion alleges—

1. That the decision is contrary to the evidence.
2. Because of newly discovered evidence.

In support of the first point applicant says:

It is not claimed that the testimony of the majority of the witnesses in the case was favorable to contestant, but it is claimed that the testimony in favor of the contestee was false and fraudulent, and that the witnesses who gave it were unworthy of credit, and of bad reputation in the community where they lived.

From this statement, it appears that the real basis of the motion is that the testimony for the pre-emptor was false, and not that the decision is contrary to the evidence. For it is admitted that the testimony of the majority of the witnesses was unfavorable to the present applicant.

The very issue to be determined was whether the land was "timber land." On this issue the claimant should have been prepared to meet adverse testimony. It is a well settled rule that a new trial will not be granted because the party came unprepared. But further, all questions touching the credibility of witnesses fall peculiarly within the province of the local officers. They have the witnesses before them, and have opportunities to observe the demeanor and actions of the witnesses, both in the direct and cross-examination.

These officers found that:

The weight of the testimony shows that the greater part of the land might be cultivated, and would be productive if it was cleared, and if the undergrowth and bushes were cleared off and grass seeds sown, some of it would produce pasturage. That the land is timber land, but is susceptible of cultivation if it were cleared.

They rejected the timber land application. That action was approved, both by your office and this Department.

In any event, the question here presented should have been raised before the local officers. If the testimony was false, that fact must have been known at the trial, and the witnesses should have been impeached then and there, or if that were impracticable, a motion for continuance to procure the requisite testimony would have saved the rights of claimant. But in any case where the facts upon which a motion for a new trial is based are known to the complaining party while the local office has jurisdiction, such motion should be filed in that office.

Furthermore, it has been held by this Department that, "a review of a decision will not be granted on the ground that it is against the weight of evidence if there was contradictory evidence on both sides." (*Long v. Knotts*, 5 L. D., 150.)

On the second point, claimant furnishes several affidavits, to the effect that the tract is covered with a heavy growth of underbrush and redwood timber, and is only valuable for the timber on it. This was the precise issue in the former trial. The evidence offered therefore is cumulative. Newly discovered evidence, merely cumulative, is no ground for a new trial. "It is said, if the rule were otherwise 'not one verdict in ten would stand. Some corroborating evidence may always be found, or made.'" (*Hilliard on New Trials*, 2d Ed., 500.) It is not shown that the evidence now offered could not be procured at the trial by reasonable diligence. It is not sufficient for the applicant to state that he did not know of the testimony in time to produce it for the trial, it must appear that he could not have ascertained it by reasonable diligence.

I find no reason for disturbing said decision, and the motion is accordingly dismissed.

RAILROAD GRANT—MAP OF GENERAL ROUTE.

NORTHERN PAC. R. R. CO. *v.* VAUGHN.

When the general route of the Northern Pacific, provided for in section six of the act of July 2, 1864, was fixed, and information thereof was given to the Land Department, by filing a map thereof with the Secretary of the Interior, the statute withdrew from sale or pre-emption the odd sections to the extent of forty miles on each side thereof.

Secretary Lamar to Commissioner Sparks, July 1, 1887.

On April 11, 1885, James Vaughn offered at the land office of Bozeman, Montana, a declaratory statement for the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and E. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of Sec. 33, T. 1 S., R. 4 E., alleging settlement May 1, 1882. The filing was rejected by the local officers, "because the tract is upon an odd section within the granted limits of the Northern Pacific Railroad Company." Vaughn further alleges that he has resided continuously on the tract since settlement, and that he has placed improvements on the land amounting to \$1500 in value.

Your office, by letter of February 13, 1886, held that:

In the present case Vaughn alleges settlement on the tract prior to date of filing in this office of a map purporting to be a map of definite location of the line of the road. No other map than a map of definite location was required to be filed by the company or authorized to be accepted by this office. Until a map of definite location should be filed, the land was open to settlement and entry as public lands under the public land laws of the United States,

and directed that Vaughn's application be allowed subject to appeal.

Under the ruling in the case of *Buttz v. Northern Pacific Railroad* (119 U. S., 55), it was decided that when the general route of the road provided for in section six of the act of July 2, 1864, was fixed, and information thereof was given to the Land Department by the filing of a map thereof with the Secretary of the Interior, the statute withdrew from sale or pre-emption the odd sections to the extent of forty miles on each side thereof.

The tract is within the limits of the withdrawal ordered April 21, 1872, upon map of general route filed February 21, 1872, and within the forty mile limits of the line of road as shown by a map of definite location filed July 6, 1882. It is not alleged that any claim to the tract adverse to that of the company existed at the time of the withdrawal on general route.

The case therefore comes clearly within the rule in the *Buttz* case, and your said decision is accordingly reversed.

NOTICE OF DECISIONS—REPORTS OF APPEALS.

CIRCULAR.

Commissioner Sparks to registers and receivers, July 6, 1887.

A large number of reports from local officers of hearings in contest cases are defective in failing to state what kind of notice was given by the register and receiver of their decisions, and whether or not any action has been taken by parties to the case.

Your attention is called to circular of this office and Department of December 18, 1885,* requiring prompt reports of appeals or other action, and to circular of October 28, 1886, (5 L. D., 204) requiring the evidence of service of notice to be transmitted in each case.

The habitual disregard by many local officers of these indispensable requirements, involves constant correspondence in repeatedly calling for the reports or evidence which it was their duty to transmit in the first instance.

You are now instructed to forthwith examine your records of contest cases heretofore decided and reported to this office, and to report at once in each case, specifically (when this has not already been done), whether appeal or other action has been taken by any interested party, and to send up the evidence of the service of the notice of your decision in each case in which such evidence has not already been forwarded.

Your attention is also called to Rule 52 of practice, which requires a separate letter of transmittal to accompany each case. The practice

**Circular of December 18, 1885.*

[Omitted from Vol. 4 of Land Decisions.]

TO REGISTERS AND RECEIVERS

U. S. Land Offices.

Gentlemen:

The habitual failure of local officers to promptly notify this office when appeals are not taken from decisions or action of this office, or where parties do not comply with requirements made, or where they take no action under notices directed to be given, involves great embarrassment and delay, and causes unnecessary correspondence to obtain the information which you are expected and required to furnish without special calls therefor.

In order to obviate these difficulties it is directed:

First. That in each local land office at least two current dockets must be kept.

1. A docket of contested cases in which every case of individual contest shall be entered when initiated, and thereafter a memorandum of every order made or action taken in such case, either by the local office or by this office or by the Secretary of the Interior, shall also be entered as soon as any action is had or notice thereof received.

2. A docket in which shall be entered every entry of any character which is held for cancellation, or in which further evidence is called for, or other requirements made involving the right of appeal or other action by the party, and reports thereon by the local officers. In each case memoranda shall at once be entered on the docket of all holdings, calls, or other action by this office, stating the nature thereof, the time allowed for appeal, reply, or other proceeding, the date and initial of Commissioner's letter, and the date of notice and evidence of service of notice, together with any other memoranda deemed necessary.

Second. The date when the period allowed for appeal, reply, or other action by the party will expire, and a report to the General Land Office by the local officers become due, must in every instance be distinctly noted on the dockets at the time notice is given to the party.

Third. Upon every Saturday the dockets must be carefully examined, and reports to this office made in all cases where time for report has arrived.

A strict observance of the foregoing is imperatively required.

You will also forthwith make a thorough examination of your records and immediately transmit reports in all cases in which reports are now due, entering on your dockets, as above required, the cases in which reports are becoming due.

WM. A. J. SPARKS,
Commissioner.

Approved:

L. Q. C. LAMAR,
Secretary.

which prevails in some offices of transmitting several cases with one letter creates confusion in the files of this office, and must be discontinued.

You will give your immediate and personal attention to the matter of this circular, and you will hereafter forward no contest case to this office without your report as to whether appeal was taken from your decision, nor without the acknowledgment of service of notice of the decision, or the affidavit of the person serving the notice, nor in case of notice by registered letter without the receipt for the registered letter or the returned letter, as the case may be.

Approved:

L. Q. C. LAMAR,
Secretary.

ACTS OF CONGRESS—EXECUTIVE CONSTRUCTION.

HEIRS OF JOHN E. BOULIGNY.

If, under any circumstances an executive department of the government has the power to declare an act of Congress unconstitutional, such authority should not be exercised except in a case where the violation of the fundamental law is so manifest as to overcome every possible presumption in favor of the validity of the statute.

Secretary Lamar to Commissioner Sparks, July 6, 1887.

This is an appeal from your decision, dated March 18, 1887, denying the application made on behalf of the heirs of John E. Bouligny for certificates of location under the act of Congress approved March 2, 1867 (14 Stat., 635), the facts material to the issue herein raised being substantially as follows:

By the above mentioned act Congress provided:

That there be, and hereby is, confirmed to Mary Elizabeth Bouligny, Corine Bouligny and Felice Bouligny, the widow and children of John E. Bouligny, deceased, the one sixth part of the land claim of Jean Antoine Bernard D'Autrive, in the State of Louisiana, said one sixth part amounting to 75,840 acres; and that inasmuch as the said land embraced in said claim have (has) been already appropriated by the United States to other purposes, certificates of new location, in eighty acre lots, be issued to the said Mary Elizabeth Bouligny for her own benefit, and that of her said minor children, in lieu of said lands, to be located at any land office in the United States, upon any public lands subject to private entry at a price not exceeding \$1.25 per acre. The Commissioner of the General Land Office is hereby directed to issue said certificates of new location in accordance with existing regulations in such cases.

Before any certificates of location were issued by the Commissioner, Congress, at its next session, March 30, 1867, passed the following Joint Resolution:

Be it resolved by the Senate and House of Representatives . . . :
That the Secretary of the Interior be directed to suspend the execution

of the act entitled: 'An act for the relief of the heirs of John E. Bouligny,' approved March 2, 1867, until the further order of Congress. (15 Stat., 353.)

Congress has never made any "further order" in the premises, and the order of suspension still remains intact.

January 23, 1877, an application was made to Commissioner Williamson for the issuance of certificates of location under the confirmatory act, which application was denied on the 21st of the following month, on the ground that the joint resolution aforesaid prohibited such issue. No appeal was taken from said decision, and thus the matter rested until the present application was made, January 26, 1887.

In a determination of the question herein raised, it will not be necessary to give a detailed history of this claim prior to its confirmation by Congress. It is enough to know that it was confirmed and that Congress had the power to make the confirmation. The Fortieth Congress believed that its predecessor had been imposed upon in confirming an invalid claim, and it therefore took such steps as would in its opinion arrest further proceedings in the premises. To that end it passed the joint resolution under consideration.

I am asked to declare this joint resolution unconstitutional and void, and to order the Commissioner of the General Land Office to issue certificates of location to the heirs of John E. Bouligny in accordance with the provisions of the Act of 1867. It must be a very clear case indeed where even the United States supreme court would declare such a joint resolution unconstitutional and void. Upon this subject the majority of the supreme court in the sinking fund cases say:

It is our duty when required in the regular course of judicial proceedings to declare an act of Congress void if not within the legislative power of the United States. But this declaration should never be made except in a clear case. Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the dominion of another without danger. The safety of our institutions depends in no small degree on the strict observance of this salutary rule." (99 U. S., 718.)

With greater force may this argument be applied to the executive department of the government, whose special function it is to execute the law; and whose power to declare an act of Congress unconstitutional, if it exists at all, which question I am not now called upon to determine, should never be exercised except in a case where the violation of the fundamental law is so manifest as to overcome every possible presumption in favor of the validity of the statute.

I deem it my duty, therefore, to obey the aforesaid resolution, unless otherwise directed by the mandate of a competent judicial tribunal. This disposition of the case renders it unnecessary to discuss the other questions so ably argued by counsel. Your decision is affirmed.

*PRE-EMPTION—CITIZENSHIP—SECOND FILING.***SOUSTILIE v. LOWERY.**

Though declaration of intention to become a citizen is not made until after filing declaratory statement, such defect, in the absence of an intervening adverse claim, is cured by the subsequent declaration, and the pre-emptive right of filing cannot be again exercised by the settler.

Secretary Lamar to Commissioner Sparks, July 7, 1887.

I have considered the case of John P. Soustilie v. Ira P. Lowery, involving the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 17, and the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 18, T. 157, R. 57, Grand Forks, Dakota.

Said Soustilie filed pre-emption declaratory statement No. 1945, for the SE. $\frac{1}{4}$ of Sec. 33, T. 155, R. 56, same land office, on June 7, 1882, alleging settlement June 4, 1881. On December 13, 1882, he relinquished all his right, title, and interest in said district, and sold his improvements.

On May 15, 1882, Soustilie settled on the tract in dispute. On June 13, 1883, he made application for re-instatement in his pre-emption right, on the ground that he was not a citizen at the time of filing his first declaratory statement—he having declared his intention to become a citizen July 12, 1882. His application for re-instatement in his pre-emption right was granted by your office letter of December 14, 1883.

Township plat was filed April 26, 1883.

January 14, 1884, Soustilie filed his pre-emption declaratory statement No. 7297 for the tract in dispute, alleging settlement May 15, 1882.

On September 20, 1883, Lowery filed his homestead entry, No. 7495, for the tract in dispute. He made settlement December 1, 1883, and took up his residence in a house which he had built thereon, December 11, 1883. He offered to make final proof therefor on July 11, 1884. Soustilie thereupon filed protest.

Upon an agreed statement of facts, which the foregoing is the substance, the local officers rejected Lowery's proof. Lowery appealed to your office, which, November 12, 1885, reversed the decision of the local office, holding that Soustilie had acted in bad faith, and was attempting by fraud to acquire title to the tract in violation of law, by "attempting to perform the impossible feat of living on two different tracts of land at the same time."

Counsel for Soustilie contend that, inasmuch as Soustilie had not declared his intention to become a citizen at the time he made his first filing, said filing was void and a nonentity; that he therefore did not have two claims upon which to live or attempt to live; and that his errors made prior to July 12, 1882 (the date of his declaration of intention to become a citizen), can not be counted against him.

Counsel for Soustilie can not claim that your office letter of December 14, 1883, was an adjudication in his favor upon the questions herein.

presented, for it was clearly made in the absence of a full statement of important facts in the case. Said letter concludes as follows :

"Soustilie may now file again, *when he shall have become qualified* in the matter of citizenship."

Even if it were the intention of your office to allow him to file for any other tract than that first filed for (which appears doubtful), it is evident that your office had not been informed that Soustilie had nearly a year and a half previously (July 12, 1882, *supra*,) declared his intention to become a citizen.

To recognize Soustilie's claim to the tract in controversy, under his declaratory statement No. 7297, would be to allow him the benefit of two pre-emption filings. If his first declaratory statement, No. 1945, was invalid because of having been made prior to his having declared his intention to become a citizen, the defect—in the absence of a valid adverse claim—was cured upon making such declaration (*Kelly v. Quast*, 2 L. D., 627; *Mann v. Huk*, 3 ib., 453). He continued to hold said first claim from the date of said declaration (July 12, 1882, *supra*,) until December 13, 1882, when he relinquished it for a valuable consideration. He had thus had the benefit of one pre-emption filing prior to his application to file for the tract now in controversy.

For the reasons herein given I affirm your decision.

MILITARY RESERVATION—EXECUTIVE WITHDRAWAL.

FORT BOISE HAY RESERVATION.

An executive withdrawal of lands for the purposes of a military reservation, in violation of the statute fixing the amount of land that may be so withdrawn for such purpose, does not take such land out of the class of public lands so as to require their disposal by special enactment.

Secretary Lamar to Commissioner Sparks, July 7, 1887.

By executive order, dated April 9, 1873, the military reservation at Fort Boise, Idaho, was declared. The reservation embraces 638 acres, and lies just east of Boise City.

Afterwards, by executive order of September 18, 1874, and upon request of the military authorities, the President made an additional reservation for Fort Boise of 587.55 acres, known as the "Hay reserve," and situate about two and one-half miles west from Boise City.

By letter dated April 19, 1884, the Secretary of War relinquished and transferred "to the custody and control of the Department of the Interior the land comprising the Hay Reservation of Fort Boise." The Secretary, in said letter, explained that instructions had been issued by the War Department in 1881 for the reduction of all such reservations in Idaho to six hundred and forty acres, so as to make them conform to the provisions of section nine of the act of February 14, 1853, but "that

by some omission unexplainable at this time the instructions, so far as they related to Fort Boise, were not received by the Post Commander, and therefore the said reservation was not reduced."

On February 24, 1885, Don C. Henderson applied to enter under the homestead law lots 7 and 8, and SW. $\frac{1}{4}$ of SW. $\frac{1}{4}$, Sec. 32, lot 9, Sec. 31, T. 4 N., R. 2 E., and lot 1, Sec. 6, T. 3 N., R. 2 E., Boise City, Idaho. At the same time and place Christian R. Purdum offered to enter under said law lot 10, Sec. 9, lots 1 and 2, Sec. 8, and lots 10, 12, 13 and 14, Sec. 5, and George R. Breidenstein offered pre-emption declaratory statement for lots 2, 3, and 4 and SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, Sec. 5, same township and range. On April 11, 1885, John M. Gakey offered homestead application for lots 5 and 11, and NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$, Sec. 5, T. 3 N., R. 2 E.

These applications were rejected by the local officers, for the reason that the land applied for was embraced in said military hay reserve. Your office affirmed said decisions, and by letter of March 4, 1886, transmitted to this Department the papers in said cases on appeal.

Claimants urge, in an elaborate brief and argument filed herewith :

First, That the executive order creating said reservation was void and could not debar settlers from appropriating said lands under the general land laws.

Second, That in any event the land became subject to entry after it had been transferred to the custody of this Department by the War Department.

In support of the first point section nine of the act of February 14, 1853 (10 Stat., 158), is cited. It provides :

"That all reservations heretofore as well as hereafter made in pursuance of the fourteenth section of the act to which this is an amendment, shall, for magazines, arsenals, dock-yards, and other needful public uses, except for forts, be limited to an amount not exceeding twenty acres for each and every of said objects at any one point or place, and for forts to an amount not exceeding six hundred and forty acres at any one point or place."

Said section fourteen of the act thus amended had placed no limitation upon the amount the President might reserve for such purposes. (9 Stat., 500.)

For the purposes of this case, it does not seem necessary to determine what was the legal status of said "Hay reserve" from the date of the executive order creating the same to the time when it was abandoned by the military authorities, and turned over by the War Department to the Department of the Interior, for the applicants herein do not claim any right antedating the transfer by the Secretary of War of April 19, 1884.

Breidenstein alleges settlement in the fall of 1884, Purdam on April 23, 1884, Gakey on May 25, 1885, and Henderson November, 1884.

The only question to be determined is, whether the lands were subject to disposal under the general land laws when said several claims were initiated.

Prior to said executive order creating the hay reserve, the land embraced therein was subject to said laws, being open public land.

It seems clear that the executive order of September 18, 1874, contemplated a reservation of land in excess of that limited by said act of 1853, and that the hay reserve constituted such excess. Said act limited the amount to be reserved for a fort at any one place to six hundred and forty acres. The original reservation for Fort Boise in 1873 embraced six hundred and thirty-eight acres, and that amount for the purposes of this case must be considered as the full complement allowed by law. The two acres which it lacked, under the maxim *de minimis non curat lex*, will not be taken account of. It follows therefore that the power of the Executive to reserve lands for Fort Boise was exhausted by the original order of 1873.

The reservation declared thereafter for the hay reserve was relinquished by the War Department when attention was called to the provisions of the act of 1853, and for the express purpose of reducing the reservation to the maximum limit fixed by law. In so doing, the Executive, acting through the head of the War Department, recognized the fact that the hay reservation was made without authority of law.

It is true that the Executive, for the purpose of carrying out the will of Congress as expressed in legislation, may put lands in reservation without special authority, and equally true that lands so reserved, and for such purpose, are not subject to disposal under the general laws, although the reservation was not contemplated by law. In the case of *Wolsey v. Chapman* (101 U. S., 755), the court said :

The proper executive department of the government had determined that, because of doubts about the extent and operation of that act, (granting lands to Iowa to aid in the improvement of the Des Moines River, 9 Stat., 77,) nothing should be done to impair the rights of the State above Raccoon Fork until the differences were settled, either by Congress or judicial decision. For that purpose an authoritative order was issued, directing the local land officers to withhold all the disputed lands from sale. This withdrew the lands from private entry, and, as we held in *Riley v. Wells*, was sufficient to defeat a settlement for the purpose of pre-emption while the order was in force, notwithstanding it was afterwards found that the law, by reason of which this action was taken, did not contemplate such a withdrawal.

See also opinion of the Attorney General of July 16, 1878 (6 Op., 80), where it was held that a withdrawal made by the Secretary of the Interior for the benefit of the Southern Pacific Railroad Company upon a line which at the time it had no authority to adopt put the lands in reservation so that no legal rights therein could be acquired under the general land laws.

These cases, however, seem to be clearly distinguished from the case at bar. They rested on the authority of the Executive to put lands in reservation, so that all questions in reference to them might be properly considered. The judgment of the Executive was that the law contemplated the withdrawals, and it was held that when lands were thus re-

served it was not in the power of a party to acquire rights by treating such reservation as of no effect. In the present case the law prohibited the making of the reservation, and this was recognized by the Executive when attention was called to the fact, and the land was immediately ordered restored to the control of the Interior Department.

Will such an act take the lands out of the class of public lands, and require their disposal by special enactment? To so hold would indicate that the Executive might in violation of law put in reservation for military purposes *any amount* of lands, and thus take them out of the operation of the general laws. To assert such a principle is to claim for the Executive the power to repeal or alter the acts of Congress at will.

It is true that lands legally put in reservation for military purposes are thereby taken out of the operation of the general land laws, and it seems equally well settled, by a long course of executive construction, and Congressional legislation, that lands so reserved do not fall back under the operation of said laws, upon relinquishment by the military authorities, but must await such disposition as Congress may see fit to adopt. See Rock Island Military Reservation (10 Op. Atty. Genl., 359); Fort Brooke (2 L. D., 603 and 606); Same (5 L. D., 632).

I am unable to ascertain that the exact question here presented has heretofore arisen either in the Department or in the courts.

By letter of August 20, 1884, your office held that the lands in question must be disposed of under act of July 5, 1884. That act provides:

That whenever in the opinion of the President of the United States the lands or any portion of them, included within the limits of any military reservation heretofore or hereafter declared, have become or shall become useless for military purposes, he shall cause the same or so much thereof as he may designate to be placed under the control of the Secretary of the Interior for disposition, as hereinafter provided, and shall cause to be filed with the Secretary of the Interior a notice thereof. (23 Stat., 103.)

The act then provides for the public sale of such lands, saving the rights of actual settlers prior to January 1, 1884, or prior to the location of such reservation.

I am unable to concur in said ruling of your office. If the order of the Executive reserving lands for military purposes, beyond the limit fixed by Congress, will serve to take such lands out of the operation of the public land laws, the principle involved must extend far beyond the present case, and ultimately trench on the control of Congress over the public domain. I cannot think that such was the intention of Congress in the act of 1884.

I therefore conclude, keeping in mind the fact that all claim and supervision by the military authorities has ceased, that the lands in question so reserved as aforesaid are subject to disposition under the general land laws, and were so when said applications were made. Nor can this conclusion be affected because said lands may have increased in value on account of the reservation in fact. The pre-emption law is

in the nature of a bounty to settlers, and awards the first qualified settler the choice of the most valuable tract. It is therefore in keeping with said law that these, the first applicants, should profit by their priority in time.

Said decision is accordingly reversed, and the applications of the present claimants will be allowed, if there be no objection beyond those herein discussed.

SURVEYS—MEANDERED LAKE.

G. W. HOLLAND.

Under the present departmental practice an order will not be made for the survey of the former bed of a meandered lake.

Secretary Lamar to Commissioner Sparks, July 12, 1887.

By letter of March 29, 1887, you rejected the application of G. W. Holland for the survey of the bed of an alleged "dried up lake," situated in sections 19 and 30, township 45 N., R. 30 W., 4th meridian, Minnesota, and said to contain about forty-four acres, upon the ground that there is no law authorizing the survey and disposal of meandered lakes.

Since 1877 it has been the policy of the Department to refuse to survey the beds of meandered lakes, for the reasons set forth in the report of the Commissioner of the General Land Office for 1877, and I see nothing in this application to warrant a change of that rule.

Besides, I am not satisfied that the bed of this lake does not inure to the owners of the adjacent tracts upon the principle of accretion, as ruled in *Boorman v. Sunnuchs*, (42 Wis., 233); and in *Forsyth v. Smale*, (7 Bissell, 201).

This application is not supported by the ruling of the Department in the *Lake Warner* case (5 L. D., 369). In that case it was charged that the original survey was fraudulent, being improperly closed on an imaginary meander line in the interest of certain occupants of land adjacent to the meander as made by the survey.

Your decision is affirmed.

PRE-EMPTION—SECOND FILING—ACT OF MARCH 3, 1853.

JOSE MARIA SOLAIZA.

By section six of the act of March 3, 1853, the right to file a second time was only recognized where the first filing had been made prior to the passage of that act.

Acting Secretary Muldrow to Commissioner Sparks, July 19, 1887.

I have considered the case arising upon the appeal of Jose Marie Solaiza from your decision of January 28, 1886, holding for cancellation his pre-emption cash entry, No. 8224, made March 29, 1884, for the N.

$\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 18, T. 5 S., R. 16 E., M. D. M., Stockton district, California, on the ground that claimant had previously (viz., March 27, 1873,) filed pre-emption declaratory statement for another tract, which he had abandoned.

Counsel for claimant contends that, as the first filing was made for unoffered land, a second filing is not inhibited—citing in support of this position the case of the State of California *v.* Pierce, decided by Mr. Secretary Teller August 1, 1882 (9 Copp, 118).

The doctrine of the Pierce case, however, has been repeatedly overruled. See case of J. B. Raymond (2 L. D., 854), and Jonathan House (4 L. D., 189).

Solaiza can not rightfully claim the privilege of a second filing under the 6th section of the act of March 3, 1853 (10 Stat., 246); since that act permits the privilege of a second filing only where the first filing has been made prior to the passage of said act.

I affirm your decision.

RAILROAD GRANT—ACT OF APRIL 21, 1876.

NORTHERN PAC. R. R. CO. *v.* BURNS.

A homestead claim, existing prior to the receipt of notice of withdrawal on general route of the Northern Pacific, excepts the land covered thereby from the operation of said withdrawal.

Secretary Lamar to Commissioner Sparks, July 13, 1887.

On April 28, 1883, George W. Burns made homestead entry for the SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, and lots 3 and 4, Sec. 3, T. 6 S., R. 1, W., Bozeman, Montana. On May 18, 1885, he made final proof, from which it appears that he settled on said tract in the spring of 1876; that his improvements consist of a dwelling house, two story barn, two buildings used for housing stock, sheds, stone milk house, about two miles of fence, and an irrigating ditch—all valued at \$2,000; that he has raised grain, about ten acres thereof each year since settlement, and used the remainder of the land for pasture during all that period; that he has maintained a continuous residence since said settlement; that he was married in 1884, and that his wife is living with him.

The local officers rejected said proof "for the reason that the tract is upon an odd section within the granted limits to the Northern Pacific Railroad Company, and for the further reason that Burns can not take advantage of Woodworth's rights in the premises."

The tract is within the limits of the withdrawal for said company upon the map of general route filed February 21, 1872, and also within the granted limits as defined on the map of definite location, filed July 6, 1882.

The claim of Woodworth, referred to by the local officers appears as follows. On March 21, 1872, Ray Woodworth made homestead entry for the tract in question, settled and maintained a *bona fide* continuous

residence thereon until April 15, 1876, when he sold his improvements to Burns, and put him in possession. Woodworth's entry was canceled by letter of your office, dated March 25, 1878.

The applicant herein appealed from the action of the local officers rejecting his proof, and your office, by letter of February 18, 1886, sustained his appeal, on the ground "that the withdrawal of 1872 upon general route was without effect as against settlers upon the lands prior to date of filing of map purporting to be of definite location."

The decision thus announced can not be sustained. In the case of *Buttz v. Northern Pacific Railroad*, the supreme court said, "When the general route of the road is thus fixed in good faith, and information thereof given to the Land Department by filing the map thereof with the Commissioner of the General Land Office, or the Secretary of the Interior, the law withdraws from sale or pre-emption the odd sections, to the extent of forty miles on each side." (119 U. S., 55.)

There is an element in this case, however, that was not involved in the *Buttz* case, and seems to control the issue herein. The map of general route was filed February 21, 1872, the withdrawal was ordered April 22, and notice thereof reached the local office May 6, 1872, more than a month after Woodworth made his entry. The act of April 21, 1876, provides :

That all pre-emption and homestead entries or entries in compliance with any law of the United States, of the public lands, made in good faith by actual settlers, upon tracts of land of not more than one hundred and sixty acres each, within the limits of any land grant prior to the time when notice of the withdrawal of the lands embraced in such grant was received at the local land office of the district in which such lands are situated, or after their restoration to market by order of the General Land Office, and where the pre-emption and homestead laws have been complied with, and proper proofs thereof have been made by the parties holding such tracts or parcels, they shall be confirmed, and patents for the same shall issue to the parties entitled thereto.

SEC. 2. That when at the time of such withdrawal as aforesaid valid pre-emption or homestead claims existed upon any lands within the limits of any such grants which afterward were abandoned, and, under the decisions and rulings of the Land Department, were re-entered by pre-emption or homestead claimants, who have complied with the laws governing pre-emption or homestead entries, and shall make the proper proofs required under such laws, such entries shall be deemed valid, and patents shall issue therefor to the person entitled thereto. (19 Stat., 35.)

This act was not before the court in the *Buttz* case, nor was it necessary to the decision therein.

It is well settled that all acts *in pari materia* are to be construed as one. Applying that maxim to the acts here under consideration, it seems necessary to conclude that, upon filing of the map of general route, "the law withdraws from sale or pre-emption the odd sections," subject however to the provisions of the act of April 21, 1876. In this view it is not in conflict with the decision in the *Buttz* case to hold that

the land in question was not affected by the withdrawal on general route. The act of 1876 was passed for the purpose of confirming entries made in good faith by actual settlers, after the date of filing of the map and prior to the receipt of notice of said filing by the local officers. The homestead claim of Woodworth was in existence prior to the receipt of such notice at the local office, and therefore excepted the tract from the operation of the withdrawal. The claim of the present applicant excepted the tract from the withdrawal on definite location. (See *Southern Minnesota R. R. Co. v. Bottomly*, 4 L. D., 208.) The company has, therefore, no valid claim to the land.

Said decision is affirmed for the reasons herein stated.

DESERT LAND ENTRY—PRIOR APPROPRIATION.

OWEN D. DOWNEY.

The entry though made when the land was apparently not subject to appropriation will not be disturbed as the claimant has acted under the allowance of said entry and the legal bar thereto has been removed, while no adverse claim has been, or is now, asserted.

Patent may issue, though the entry covers a small portion of land not susceptible of irrigation.

Acting Secretary Muldrow to Commissioner Sparks, July 15, 1887.

August 20, 1879, Owen D. Downey filed in the land office at Cheyenne, Wyoming, his declaration of intention, No. 140, to reclaim the N. $\frac{1}{2}$ of SW. $\frac{1}{2}$, N. $\frac{1}{2}$ of SE. $\frac{1}{4}$ and lots 1, 2, 3 and 4 of Sec. 4, T. 15 N., R. 73, containing 216.63 acres, under the provisions of the desert land act of March 3, 1877 (19 Stat., 377).

No final proof having been submitted by him within the legal period of three years thereafter, your office, by letter "C" dated December 20, 1883, directed the register and receiver to notify claimant to show cause within ninety days why his claim should not be forfeited and his entry canceled. In response to said notification, Mr. Downey, on the 17th of March, 1884, filed in the local office an affidavit alleging that he had made valuable improvements on said land, had commenced to irrigate it, but had not yet completed his work; and he therefore asked an extension of time for one year from that date within which to complete said irrigation.

By letter of December 8, 1885, the local officers transmitted the final proof of Downey, submitted November 30, 1885. In their letter of transmittal, the local officers say, "Not being conversant with the facts of the case, we are unable to make any recommendation in the premises. The final proof offered, seems on examination to be sufficient."

February 10, 1886, your office held Downey's entry for cancellation as to the N. $\frac{1}{2}$ of SW. $\frac{1}{4}$ and Lots 3 and 4, Sec. 4, because that much of

it conflicted with the prior timber culture entry No. 2 of Stephen W. Downey, made April 2, 1875, and gave him sixty days within which to appeal. This decision was adhered to on review June 28, 1886, and the final proof rejected, and again adhered to by decision of September 28, 1886. Whereupon the case was brought to the Department on appeal from all of said decisions.

Among the papers in the case is found the affidavit of said Stephen W. Downey, the former timber culture entryman, to the effect that he never complied with any of the requirements of the timber culture law in the matter of said entry, but relinquished the same and filed said relinquishment in the local office some time prior to August 20, 1879; that he supposed until recently that his said entry was canceled on the records. He thereupon filed a second relinquishment of his said entry, and asked that the desert entry in question be not interfered with on account of any supposed right to the land in himself. His entry was formally canceled as you state March 23, 1886.

Your office decision of September 28, 1886, however, states that Downey's first relinquishment was for only a part of his original entry, to wit, lots 5, 6, 7, and 8 of Sec. 23, T. 16 N., R. 73 W., and that no relinquishment of that part of his entry in conflict with the desert entry in question was ever received prior to that upon which the entry was canceled March 23, 1886, as aforesaid.

If, as a matter of fact, the timber culture entry of Stephen W. Downey was relinquished prior to the time when the desert entry went to record, then said desert entry should not be interfered with, simply because the relinquishment was not noted on the records. If, on the other hand, said relinquishment was not filed prior to the allowance of said desert entry, technically speaking said desert entry should not have been allowed. Yet it was allowed by the local office and no objection was made to it on this score by your office until February 10, 1886. At a matter of fact the land appears to have been abandoned by the timber culture entryman long prior to the allowance of the desert entry, and to have been in the possession of the desert entryman ever since his entry in 1879. The timber culture claimant expressly disclaims having had any interest in said land since prior to 1879, and has "again," as he says, "relinquished" his claim. In view of the fact that the desert entry was allowed to go to record, that the entryman relying upon such proceeding has had possession of said land ever since improving and irrigating the same, and that there has not been and is not now any adverse claimant to said lands, I am of opinion that his entry should not be interfered with on that ground. Alexander Polson (4 L. D., 364).

The final proof was not made within the three years specified in the statute. But in the absence of adverse claims this is a matter which it is competent for the Department to overlook where there are no indications of bad faith. Alexander Toponce (id., 261).

I have therefore examined the final proof in the case on its merits. It seems to be sufficient as to all but about thirty acres of high land on the eastern part of the claim. All the rest of the land is irrigated as required by the law, with a sufficient amount of water to reclaim the land from its desert condition, the claimant has an absolute right to the water used, and the supply appears to be permanent. Were it not for the fact that about thirty acres of the entry have never been irrigated at all, I would have no hesitancy in allowing the same to proceed to patent.

It is not shown in the final proof that said thirty acres are not susceptible of irrigation, so as to bring the case within the rule laid down in the cases of George Ramsey (5 L. D., 120), and Levi Wood (id., 481); but it is alleged in the argument on appeal that such is the case. If, as a matter of fact, these thirty acres are so high and rocky as to be practically not susceptible of irrigation, and thus absolutely worthless to the government or any one else, then the case becomes similar to the Levi Wood case (*supra*), and the entry should be allowed to proceed to patent, otherwise I would see no objection to claimant relinquishing the subdivision not irrigated and taking patent for that part of his entry in relation to which the law has been complied with.

You will therefore call upon claimant to furnish a corroborated affidavit showing fully the nature and character of the thirty acres referred to, whether the same can be irrigated, and its condition generally. After which you will re-adjudicate the case in accordance with the foregoing suggestions and directions.

The decisions appealed from are so modified.

HOMESTEAD—RESIDENCE; SPECULATIVE CONTEST.

VAN OSTRUM *v.* YOUNG.

A settler who goes upon public land with the intention of remaining just long enough to secure title by colorable compliance with the law, and then return to his former home where his family has in the meantime resided and the greater part of his personal property remained, does not establish or maintain the residence required by the homestead law.

No rights are acquired by fraudulent and speculative contests.

Acting Secretary Muldrow to Commissioner Sparks, July 15, 1887.

This is a contest brought by Otto Van Ostrum against the homestead entry No. 5426 of James Young, embracing the SW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ and S. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 26, T. 1 S., R. 1 E., Salt Lake City, Utah; and comes here pursuant to departmental order of March 17, 1887, under rules of practice 83 and 84, for review of your office decision, dated July 9, 1886.

The material facts in the case are substantially as follows: Young made his entry November 22, 1881, having previously purchased for \$250 certain improvements on the land from a former occupant, who was disqualified from entering it. Contest was brought April 30, 1885,

the charge being the usual one of abandonment, change of residence for more than six months since making said entry and next prior to the date thereof, and failure to settle and cultivate said tract as required by law. Upon consideration of a large amount of testimony taken at a hearing duly had, the local officers recommended the dismissal of the contest and their finding was affirmed by your office.

The evidence shows that the entryman is the owner of about twenty-five acres of land lying from a quarter to a half a mile from the land in contest, upon which small tract he and his family consisting of a wife and five children had resided for a number of years prior to the time his entry was made. Shortly after making entry he moved a bed, heating-stove, chair and a few other essential household articles into the house he had purchased on the land in question. From that time up to the date of contest (a little over three years) it is fairly shown that the entryman remained on his homestead the greater part of the time, sleeping there on the average about five nights in the week, and taking his meals there part of the time. His wife and children remained all the time at their former home, and never pretended to reside upon the land in contest. Claimant says his wife refused to move with him to the land in question, for the reason that she had moved so many times before, and because there had been diphtheria in the house on the homestead. He has cultivated about forty or fifty acres of the homestead, and has run about two miles of irrigating ditches, his improvements in all being valued at from \$1000 to \$1200. His personal property, with the exception of the few things removed to his homestead, remained on the twenty-five acre tract, and he admits that he intended to remain on the homestead not longer than five years from date of entry and then return to his former home. During a part of the time he claimed to be residing upon his homestead he had a portion of his house there rented to a tenant by the name of Binley from whom he was to receive \$2.00 per month rental. His clothing, with the exception of that for immediate use, was left at his former home, and his washing was done there. About once a week his daughter came up to the homestead, and swept out the house, and re-arranged and cleaned up what few household articles were there.

Upon these admitted facts the local officers and your office found that claimant acted in good faith, and complied with the law. But I can not think so. I am willing to concede that he has the intention of acquiring title to the land, and perhaps for his own use; but it is not conceded that he ever established such a residence there as the homestead law contemplates. His every action in relation to this land shows that he considered it a mere temporary abiding place, and not a home. He intended to stay there just long enough to secure title by a colorable compliance with the law, and then return to his former home, where his family all the time resided, and where his personal property was nearly all kept. This is not residence under the homestead law. It is true the improvements on the land in the way of irrigating ditches, etc., are sub-

stantial and valuable; and his house is also fair. But there is no better settled rule of law in the Department than that cultivation and improvement can not be accepted as the equivalent of residence. The homestead law is imperative on this subject and must be followed.

It is urged, however, that the contest should be dismissed, because of its speculative character. It is shown beyond any question or doubt that Van Ostrum is a professional contestant; that his object in all his contests is merely to secure a preference right and then sell it, or else to withdraw the contest before trial for a consideration. In this case he offered to withdraw the contest, if the claimant would give him a deed for forty acres of the land in contest; but this the claimant refused to do.

There is other evidence in the case, too, to show that the contestant is acting in bad faith. For instance, in the affidavit of contest he swears that "after diligent search and inquiry, the whereabouts of James Young can not be found, and as personal service can not be made, I therefore ask that due notice be given by publication"; while as a matter of fact, he had known for a long time that the claimant could be found either on his homestead, or on the twenty-five acre tract near by. It seems, however, that he did not get an order for publication, but, on the contrary, within a very few days after swearing to the above affidavit, he went to Young's homestead, in company with another individual who personally served Young with notice of contest.

These admitted facts render Van Ostrum's contest fraudulent and speculative, and he can acquire no rights by virtue of it. *Neilson v. Shaw* (5 L. D., 358-387).

But the government is not prevented from taking advantage of the facts proven at the hearing. Having found that Young has failed to comply with the law, and has not acted in good faith, I direct that his entry be canceled.

The decision of your office is modified accordingly.

PRACTICE; EVIDENCE—AFFIDAVIT FOR CONTINUANCE.

TASCHI v. LESTER.

On the admission that the witness, if present, would testify as alleged in the affidavit for continuance, such allegations should receive due consideration as evidence in the case.

Acting Secretary Muldrow to Commissioner Sparks, July 15, 1887.

I have considered the case of Gerhard Taschi *v.* Cassius Lester, as presented by the appeal of the former from the decision of your office, dated July 3, 1885, dismissing his contest against Lester's homestead entry No. 2357 of the SE. $\frac{1}{4}$ of Sec. 32, T. 115 N., R. 65 W., made March 20, 1883, at the Huron land district, in the Territory of Dakota.

On March 21, 1884, Taschi filed his affidavit of contest, alleging abandonment and failure to establish residence upon said tract. The case was set for trial on June 9, and continued to July 21, 1884. On the last named date the contestant appeared with his witnesses and the claimant being absent was represented by counsel, who submitted an affidavit and moved for a continuance to enable the claimant to be present. The contestant admitted that if the claimant were present he would testify as stated in the affidavit of his counsel, and the trial proceeded.

The testimony, by agreement of counsel for both parties, was taken down by a stenographer, the register and receiver not being present. The witnesses, however, were sworn by the register. From the evidence submitted, the local land officers decided upon the authority of *Byrne v. Catlin* (2 L. L. 406), that the claimant never established a residence upon said tract, and they recommended the cancellation of said entry. In their opinion the register and receiver state "no testimony was submitted in behalf of claimant," and they do not refer to the excuses offered by claimant for his absence from the land as set forth in the affidavit of his attorney.

Your office, on appeal, found that the testimony in the case shows that claimant acted in good faith, and upon the authority of the case of *Lauren Dunlap* (3 L. D., 545), dismissed the contest.

It is evident that the local land officers should have considered the statements in said affidavit of counsel for claimant, for it would be manifestly unjust to admit that the claimant, if present, would testify to certain statements and then disregard those statements.

* * * * *

It being alleged by contestant in his corroborated affidavit filed since the decision of your office was rendered, that claimant has failed to comply with the requirements of the homestead law, since said hearing, such allegation may, I think, properly be made the subject of another hearing, at which each party can have an opportunity of submitting testimony.

A careful consideration of the whole record shows no good reason for disturbing the conclusion of your office. Said decision is accordingly affirmed.

HOMESTEAD ENTRY—NEW FINAL PROOF.

CLARA MORRISON.

New final proof may be submitted showing compliance with the law up to the date when the former proof was made, though compliance subsequently thereto cannot be shown, it appearing that through no fault of the claimant said proof did not show all the material facts.

Acting Secretary Muldrow to Commissioner Sparks, July 18, 1887.

On the 18th of September, 1884, Clara Percy made homestead entry of the SE. $\frac{1}{4}$ of Sec. 19, T. 120 N., R. 63 W., Huron, Dakota. On

the 18th of May, 1885, she offered final commutation proof for the same, before the probate judge of Spink county, Dakota, and paid the money for said land to that officer to be transmitted to the local officers at Huron. Upon this proof the register and receiver received said money and issued to her final certificate No. 13,086 June 3, 1885.

November 7, 1885, your office rejected said final proof, suspended the new final certificate, and gave claimant sixty days within which to submit new final proof or to appeal. She appealed, and the case has been considered.

The final proof shows claimant, at that time, to have been a single woman, twenty-three years of age; that her improvements consisted of a frame house, eight by ten feet, with door, window, and floor, and roof of boards and tar paper, walls of boards covered with tar paper and battened, a frame stable, twelve by twelve feet, a good well of water, and twenty acres of breaking, ten of which were cultivated to crop one season—all valued at \$175; that her house was built on the land about December 1, 1883, and that she established her residence there September 20, 1884. In answer to the question: "For what period or periods have you been absent from your homestead since making settlement and for what purpose?"; etc., she replied:

I was temporarily absent from said land about three weeks in September and same in October and November of A. D. 1884, at work to earn means to improve said land; and from the 15th of December, 1884, until February 1, 1885, I was absent on account of sickness; and I was absent one week about last of March and two weeks about the last of April and first of May, 1885. These are all my absences.

Your office rejected this proof "because proof and payment were not made simultaneously, and her residence has not been continuous for any period of six months since entry."

With her appeal here claimant files a special affidavit, setting forth that since making her final proof, to wit, July 21, 1885, she was married to one Thomas Morrison, with whom she now (January 25, 1886,) resides in Aberdeen, Dakota; that she is unable to give any reason why the date of payment and date of proof are not the same, as she made her said proof before the probate judge of Spink county, on the day advertised, and her said proof and payment were then immediately forwarded to the local office at Huron; that any difference which may exist between the dates of proof and payment is not chargeable to affiant's fault or neglect; that at the time she occupied said tract as her home she had no other home and was compelled to be away from the claim as set out in her proof for the purpose of earning a living for herself, and that she did not at any time abandon her house on said land; that while she was sick as stated in her final proof she was taken to her father's home for care and nursing; that she expended all her earnings upon said tract in improving it; that notwithstanding her said proof shows that she settled upon said tract on September 18, 1884, she in reality settled there in the month of December, 1883, established her

residence immediately thereafter, and continued to reside there from *that* date to the time of her final proof; that her attorney afterwards told her she must make another filing on account of some mistake he had made; and that she relied under his advice and direction the last filing and her final proof, not showing the correct date of her actual settlement, as she now believes.

I am not satisfied from the record as now made up that the entry in this case should be allowed to proceed to patent. The difference between the dates of final proof and the issuance of final certificate herein appears to be satisfactorily accounted for and should not militate against the entry. It appears, however, that claimant can not now make new final proof showing compliance with the law up to the present time. Neither ought this be required, if, as a matter of fact, she had complied with the law when the former proof was offered.

If her present allegations be true, it would appear that on account of erroneous advice given by her attorney her final proof did not show all the material facts connected with her claim. I think, therefore, in justice to the claimant, as well as in the interest of the government, that she should be allowed to submit new final proof showing compliance with the law up to the time when her former proof was offered.

The decision appealed from is so modified.

PRE-EMPTION—DEATH OF CLAIMANT—DEVISE.

CUMMINS *v.* ADMR. OF BURT.

On the death of a pre-emptor the entry will be made in favor of the heirs, and title inure to them generally, the Department not undertaking to say who they are. A pre-emptor cannot, by devise, defeat the right conferred by statute upon the heirs. A will executed *in articulo mortis*, though unauthorized by law, will not be presumed to have been made with fraudulent intent.

Acting Secretary Muldrow to Commissioner Sparks, July 18, 1887.

I have before me a motion filed in behalf of David S. Cummins, asking that further proceedings looking to the issuance of patent be suspended and that a new trial be granted in the case of said Cummins *v.* Geo. B. Burt, decided by this Department July 30, 1885 adversely to Cummins.

Said decision involved the question as to which of the parties had the superior right to the N. W. $\frac{1}{4}$ of Sec. 25, T. 1, N., R. 10 W., Los Angeles, California.

Cummins had assailed Burt's good faith under his pre-emption filing made for the tract described, charging that he was holding the land not for himself, but for one La Fatra. The Department affirming the action of your office and of the local office found the charges not sustained, and also found Burt's final proof to be satisfactory.

Said final proof had been offered by Burt at the date of the hearing on the Cummins contest. The motion for new trial filed in March 1887, more than a year and a half after the departmental decision referred to, states that Burt died while his claim was pending here on appeal, and that M. H. La Fatra was appointed administrator of the estate of said Burt.

The grounds for the motion are :—

1st. That the entry of La Fatra as administrator is for himself as administrator, and not in the name of the heirs as required by sec. 2269 of the Revised Statutes.

2nd. That the alleged occupancy of said land by said Geo. B. Burt was collusive, and was not in good faith for himself, but was fraudulent, in that he had made a corrupt bargain with said M. H. La Fatra to convey to him a part of said land.

3rd. That the will as to this land was in effect a transfer by sale of 40 acres of the land to said La Fatra, and that such attempted transfer was in violation of law and void.

In regard to the first objection, your office at the time of deciding the contest found that the proof offered by Burt showed his compliance with the law in the matters of improvement and residence, and the Department in affirming that decision said that Burt's good faith must be regarded as established and his final proof as satisfactory. It would seem therefore that the case was ready for cash entry so far as the proofs were concerned, immediately after the hearing on the contest, but actual entry was delayed by the appeals of Cummins.

In the meantime, as it appears, Burt has died, and it is charged that the administrator, La Fatra, is about to secure for himself a title under a will made by Burt to a portion of the tract covered by Burt's pre-emption claim, in violation of law. The manner and form of making final entry in cases in which the original claimants have died are so well established by law and regulation that I am bound to assume that your office will see to it that the entries in such cases are in correct form and to the proper parties. So assuming, I take it for granted that when your office reaches the case for action on the final entry papers and for approval for patent it will see that title goes only as provided by Sec. 2269 of the revised statutes.

Under that law the administrator can of course get no title in himself, unless he can do so as one of the heirs; but the entry will be in favor of the heirs, and title will inure to them generally, this Department or your office not undertaking to say who they are.

The statement made as the second ground for a new trial, that Burt's pre-emption claim was fraudulent because made in collusion with and for the benefit of La Fatra, presents the exact question which was in issue in the trial under the contest, and which was then passed upon.

Contestant avers that he has newly discovered evidence on this point which, if he be allowed to offer it, will consist of the testimony of certain

parties to the effect that Burt had stated to them that La Fatra was to have part of the land covered by his pre-emption claim.

I have serious doubts as to the admissibility and competency of testimony of the character proposed, even if the case were to be reopened.

To admit such evidence would be to accept testimony relative to statements alleged to have been made by claimant, which testimony he, being dead, could not refute, or even deny. Moreover, such evidence, even if admitted, would be merely cumulative, for at the trial had just such testimony as that which it is proposed to furnish, was taken and considered.

The third reason assigned as a ground for new trial, is that the will made by Burt purporting to devise to La Fatra a portion of the tract in question, was in its nature a transfer by sale of the land thus devised, and was void.

If it was intended by said will to devise any portion of this land so as to defeat the right of the heirs or any of them then to that extent said will could convey nothing and would be without force; but such will does not in my judgment imply bad faith with reference to the law, nor an intention to commit a willful fraud.

The language of the will shows that at the time of making it the deviser was expecting to live but a few hours at most, and it is not to be presumed that a man *in articulo mortis* would be engaged in scheming to commit fraud. Under such circumstances fraud will not be inferred though the act was without authority of law. A careful consideration of the application furnishes no good reason for granting a new trial. The motion with accompanying papers, is accordingly denied and transmitted herewith to be filed with the papers in the case.

TIMBER LAND ENTRY—MARRIED WOMAN.

ISABELLA M. DWYER.

A married woman, who by the laws of the State is authorized to purchase and hold realty as a *feme sole*, and independently control her separate property, is entitled to make timber land purchase under the act of June 3, 1878.

Acting Secretary Muldrow to Commissioner Sparks, July 18, 1887.

Isabella M. Dwyer made timber land entry No. 6335 August 7, 1884, of the NE. $\frac{1}{4}$ of Sec. 15, T. 14 N., R. 1 E., Humboldt, California, after submitting proper proof according to law.

On September 7, 1886, Special Agent B. F. Bergen reported that the claimant was not qualified to make the entry, she being a married woman.

Upon this report you held said entry for cancellation, and allowed the entryman sixty days in which to apply for a hearing.

In accordance with said direction, the entryman filed her application for a hearing, setting forth the fact that she is a married woman, and was such at the date of entry; that in June, 1876, she was made a sole trader by a decree of the court under the laws of California; that she has been and is now doing business as a sole trader; that she now, and for a great many years last past, has supported herself and family by her own exertion; that she entered said land for her sole and separate use and benefit, and not for the use and benefit of any other person; that she purchased said land with her separate money, and that her husband has no interest in or claim upon the purchase money aforesaid.

Upon the receipt of this protest, you, by letter of February 15, 1887, held that hearing was not necessary, as the entryman admitted the facts upon which said entry was held for cancellation, to wit, that she was a married woman at the date of said entry, and thereupon you again held said entry for cancellation, subject to the right of appeal, which is now before me.

As the laws of California permit a married woman to purchase and hold realty as a *feme sole*, and to control and manage her separate property, free from all and any interference from her husband, I am of opinion that the entryman in this case is entitled to purchase under the act of June 3, 1878. Nor does the fact that the entryman has, since making said entry disposed of the claim afford sufficient proof of bad faith to warrant the cancellation of the entry. She swears that she did not directly or indirectly make any bargain or sale, or agreement to sell and convey said land to any one prior to making final proof, but that she entered said land for her own use and benefit, and not for the benefit of any other person.

The special agent presents no fact indicating fraud but recommends the cancellation of the entry solely on the ground that "the entryman was a married woman, and not qualified to make entry."

Your decision is reversed, and you will approve the same for patent.

RAILROAD GRANT—PRIVATE CLAIM.

GORDON v. SOUTHERN PAC. R. R. CO.

Though the tract in question was ultimately excluded from the private claim, the question as to its status was *sub judice* at date of the grant and indemnity withdrawal thereunder, and excepted said tract therefrom.

Acting Secretary Muldrow to Commissioner Sparks, July 18, 1887.

I have considered the case of George W. Gordon v. the Southern Pacific Railroad Company, involving lots 3 and 4, and the E. $\frac{1}{2}$ of SW. $\frac{1}{4}$, Sec. 19, T. 16 S., R. 3 E., M. D. M., San Francisco, California, on appeal by the railroad company from your office decision, dated August

28, 1885, allowing Gordon to make homestead entry for the tract described.

Said land, it appears, fell within the twenty miles, or granted, limits of the grant as claimed by the Atlantic and Pacific Railroad Company of lands between San Francisco and San Buenaventura, as shown by a map designating the line of said company's road opposite said tract, filed in your office March 12, 1872, and in accordance with which lands were ordered withdrawn by your office letter, dated April 22, 1872, which was received at the local office on the 2d of May following. Said company is not here asserting any claim to the land in question, and it is sufficient to remark that by the decision of this Department, dated March 23, 1886 (4 L. D., 458), the withdrawal referred to of lands between San Buenaventura and San Francisco was vacated as without authority of law and void, and the lands so withdrawn were restored to the public domain.

It further appears that the tract under consideration is also within the thirty miles, or indemnity, limits of the grant of July 27, 1866, to the Southern Pacific Railroad Company (14 Stat., 292), the withdrawal for the benefit of which was ordered by letter of March 22, 1867, received at the local office May 8, 1867.

The grant to both the companies mentioned was by the same act of Congress.

Your office decision states that the township plat was filed in the local office November 23, 1875; that the records do not show that any entry or filing had been made for the land described, nor does it appear that it has been selected by either of the railroad companies.

Gordon applied November 5, 1884, to make homestead entry for said land. His application was rejected by the register and receiver, because of the claim of the railroad companies.

On appeal, your office reversed that finding, and held that neither of said companies had any valid claim to the tract; that at the date of Gordon's homestead application said tract was public land, subject to entry, and said application was therefore allowed subject to appeal. The Southern Pacific company duly appealed, and the matter is now before me for consideration.

Your office decision finds that the tract in question was embraced within the claimed limits of the "Rancho Corral de Tierra," as shown by the survey thereof made by Deputy U. S. Surveyor Thompson, in March, 1868, which was *sub judice* until June 1, 1875, the date on which the Department approved the decision of your office, dated October 30, 1874, rejecting said survey. If your office finding as above is correct, then clearly this tract was not included in the railroad withdrawal, but was subject to entry in the manner indicated by Gordon's application of November 5, 1884, and the railroad company has no valid claim thereto. But the correctness of such finding is denied by the company, and it is urged in its behalf that the fact of the rejection of the Thomp-

son survey and the ordering of a new survey, which was made and approved, excluding this land from the rancho, shows that the Thompson survey went outside of the exterior boundaries of said rancho grant, and therefore was illegal and void, and could not defeat the claim of the railroad under its grant and withdrawal.

This position is not tenable. While it is true that the Thompson survey was rejected and that a new survey was ordered, which was made in November, 1875, excluding this tract, pursuant to and based upon which patent issued January 21, 1876, on account of the rancho grant, such action does not change the fact that said rancho claim and the Thompson survey thereof were *sub judice* at the date of the railroad grant and of the withdrawal on account of the same. In other words, though it turned out that the Thompson survey was not satisfactory and a new survey was necessary, that question was not determined until long after the grant and the withdrawal for the benefit of the railroad company, and until it was determined the whole matter was *sub judice* and the lands were in reservation. As soon as the patent issued for the rancho grant, to wit, January 21, 1876, and not until then was the reservation removed from that portion of the claim not covered by the patent. In this view the railroad company can have no valid claim to, and could not be allowed to select as indemnity, the tract in question, it having been settled upon and being claimed by Gordon who, so far as the record shows, is a settler qualified to make entry under the homestead law.

His corroborated affidavit is to the effect that he is a qualified settler; that he has with his family continuously resided upon the tract which he seeks to enter since 1868, and that his improvements upon the same are worth at least \$2000.

For the reasons herein given, your office decision allowing Gordon to make homestead entry on the tract described is affirmed.

PRE-EMPTION—STATUTORY RESTRICTION.

MURDOCK v. HIGGASON.

In the enforcement of the inhibitory provision that denies the right of pre-emption to one "who quits or abandons his residence on his own land to reside on the public lands in the same State or Territory," due consideration must be given the presumption of good faith that attends the exercise of legal rights.

Secretary Lamar to Commissioner Sparks, July 18, 1887.

Oscar Higgason made homestead entry, 1879, at Oberlin, Kansas, and on September 10, 1884, made final proof and received final certificate thereon.

October 19, 1884, he settled upon school lands in the State of Kansas, made proof of settlement and residence as required by the laws of said State, and sold said tract to J.B. Wilsey November 15th thereafter.

November 18, Higgason made settlement upon the N.E. $\frac{1}{4}$ of Sec. 11, T. 3 S., R. 26 W., Oberlin, Kansas, and filed pre-emption declaratory statement for the same November 24.

December 2, Thomas D. Murdock made homestead entry of the same tract. July 2, 1885, Higgason offered to make final proof, when Murdock appeared and protested, alleging failure to make a legal settlement, and non-compliance with the law as to residence and cultivation prior to offering proof.

Upon this protest a hearing was had before the register and receiver, who decided in favor of the settlement of Higgason and left his declaratory statement intact with privilege to prove full compliance with the law as to residence and cultivation within the statutory period. From this decision Murdock appealed, and upon said appeal the Commissioner, by letter of July 8, 1886, affirmed the decision of the local officers.

August 5, Murdock filed a motion for reconsideration of said decision, upon the ground of "an omission in said decision to consider and rule upon important facts showing fraud and illegality in the claim of Higgason, to wit, in moving from his homestead entry to his pre-emption claim.

This motion was served upon Higgason's attorneys, who failed to respond thereto, for the reason as alleged that they believed, if your former decision was disturbed, it would only be to order a hearing as to the new matter alleged in Murdock's motion for reconsideration.

December 9, 1886, you reviewed said decision and ordered the cancellation of Higgason's entry, from which action Higgason appealed.

Certain facts were shown by the record in this case that are not disputed, to wit: that at the date of Higgason's pre-emption settlement he had received final certificate on his homestead claim, which had not been conveyed; that he left his homestead to settle upon school lands in October; that he made final proof of residence upon and cultivation of said school lands, and sold the same November 15, and on November 18 made settlement on his pre-emption claim.

The prohibition in the tenth section of the act of September 4, 1841 (5 Stat., 453), that no person shall acquire the right of pre-emption "who quits or abandons his residence on his own land to reside on the public lands in the same State or Territory" even if applicable in a case where the land removed from was acquired under the homestead law, is not applicable to the facts in this case. The purchase of Kansas school lands by Higgason, after having received final certificate on his homestead claim, was the exercise of a legal right, and hence is presumed to be *bona fide*, and free from fraud or illegality, unless the contrary be proven. The evidence shows that Higgason did not quit or abandon his homestead claim when he made his pre-emption filing, but on the contrary that he removed from school lands which he had purchased subsequently to his making final proof on his homestead claim, and

which said school lands he sold before making his pre-emption filing. There being no evidence shown by the record that the school lands were purchased for the mere purpose of making a temporary change of residence with a view to qualifying himself as a pre-emptor, or to rebut the legal presumption that his change of residence from the homestead to the school tract was *bona fide* and with the intention of making said tract his home, the prohibition contained in the act of September 4, 1841, does not apply.

For the reason above stated, your decision is reversed, and you will approve the entry of Higgason for patent.

SWAMP LANDS—EFFECT OF CERTIFICATION.

STATE OF MINNESOTA.

Though the approval and certification of swamp lands determines affirmatively their swampy character, the Department may revoke such action if it was the result of fraud or mistake.

Acting Secretary Muldrow to Commissioner Sparks, July 18, 1887.

By letter of October 1, 1885, you refused to issue patents to the State of Minnesota for approved lists, numbers 19 and 20, of swamp and overflowed lands in the Duluth, Minnesota land district, for the reason, as stated in your letter, "of the many allegations of gross error and fraud in the returns made by the deputy U. S. surveyors of swamp and overflowed lands in Minnesota received at this office, action in all this class of cases has been suspended until these charges can be investigated."

From this action the State appealed, urging that said list has been approved by the Secretary and certified to the State as swamp and overflowed lands, and that a reconsideration of this matter was beyond your jurisdiction.

The Secretary of the Interior has jurisdiction to review the decision of a former Secretary, or to revoke or recall its own decision when obtained by fraud or mistake, and if the record discloses such facts, the Department will take jurisdiction, irrespective of the authority or jurisdiction of the Commissioner.

In the case of the State of Oregon (5 L. D., 31), involving this same question, the Department held that the approval and certification of the Secretary of swamp and overflowed lands determined affirmatively their swampy character, and such certification can not be revoked or canceled, unless it be shown that it was obtained by fraud or mistake. This decision followed the uniform ruling of the Department as to the finality of the decision of the Secretary upon such issues.

No evidence upon which your action was based was transmitted with your letter, nor has the Department been advised of the result of any investigation of this matter; but by letter of April 18, last, you trans-

mit the affidavit of Barney Keegan, surveyor, corroborated by the oath of John Simmons, chairman, who swears that he surveyed township 61, range 21 W., and township 62, range 22 W.; that he does not believe the field notes of said survey were ever turned over to the surveyor-general, but that false and fraudulent ones were turned over instead; that the return of said township as made by the surveyor-general, and as appears by the plat on file, is false and fraudulent, and that the land represented as swamp in said township is the only valuable land in said township, and is high land, valuable for agricultural purposes.

I think this charge, supported by the affidavits of two witnesses, is sufficient to warrant an investigation of the character of these two townships, and I therefore direct that you instruct the local officers at the Duluth Land District, after due notice to State authorities, of a time to be fixed by them (but as early as practicable) to take testimony as to the character of the lands in said townships 61 and 62, certified to the State as swamp land; and also as to the truth of the allegation contained in the affidavit of Barney Keegan, and to forward the record of said testimony, with their report thereon, to your office, for transmission to the Department, with your views upon the same.

As to the lands in the other townships embraced in list 20, and all the lands in list 19, there being no evidence or specific charge of any fraud connected therewith, I see no ground which would authorize the Department to take jurisdiction as to these lands, or to further hold in suspension the issuance of patents therefor.

You will advise Mr. W. P. Jewett, State Agent of Minnesota, of this action.

DESERT LAND ENTRY—NON-IRRIGABLE LAND—CONTIGUITY.

WILLIAM H. HOLLAND.

The necessary exclusion of a portion of the lands originally entered, on account of their non-irrigable character, leaving the entry defective for want of contiguity in the tracts covered thereby, the entryman may elect which contiguous tracts he will take.

Acting Secretary Muldrow to Commissioner Sparks, July 18, 1887.

April 14, 1883, William H. Holland made desert land entry No. 537 of the E. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of Sec. 19, the NE. $\frac{1}{4}$, N. $\frac{1}{2}$ of SE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 30, T. 51 N., R. 81 W., Cheyenne, Wyoming. August 27, 1885, he submitted final proof for the same, showing that he had reclaimed all the tract except the N. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, of SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ and the greater portion of the NE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Sec. 30, in a good and sufficient manner, and had raised a crop of hay and oats on the subdivisions irrigated. The local officers refused to accept the proof, and under date of September 4, 1885, submitted the same to your office for instructions. April 6, 1886, you rejected the proof, because a part of the land

had not been reclaimed, and for the further reason that the entry was not considered compact. The case has been considered here on appeal.

It is shown by the record that the subdivisions not irrigated are high, rocky bluffs, not susceptible of irrigation, and were originally included in the entry only that it might be compact. The lands in sections 19, 20 and 30, adjacent to this entry, have all been taken up by other parties, so that it will be impossible to make the entry more compact than it is and still retain the amount of land originally entered. The adjacent land in section 29 is of a rough, stony character, very high, and not susceptible of irrigation. To drop rocky land from the entry will render it less compact than it is at present.

It thus appears that there is no legal way by which the entryman can retain either his entry as originally made, or the parts thereof which have been irrigated. The greater part of the NE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Section 30 not being susceptible of irrigation, he can not include that in his entry, and as the SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of said Section 30 have not been irrigated at all, those tracts can not be included in the entry. The E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 19, is not therefore contiguous with the remaining part of the entry irrigated.

Under the circumstances the party may elect which contiguous tracts he will enter—whether the eighty acres in Sec. 19, or the one hundred and sixty acres irrigated in Sec. 30—within a reasonable time, say thirty days, from receipt of notice of this decision. If he fail to so elect, his entry will then be canceled.

The decision appealed from is modified accordingly.

PRACTICE—AUTHORITY OF COMMISSIONER TO ORDER HEARING.

JOHN STEENERSON.

In the investigation of an alleged fraudulent entry the Commissioner of the General Land Office may, in the exercise of a sound discretion, order a second hearing.

Acting Secretary Muldrow to Commissioner Sparks, July 18, 1887.

John Steenerson has filed an application for certiorari under rules of practice 83 and 84, in the matter of his pre-emption, cash entry No. 3928 of the SW. $\frac{1}{4}$ of Sec. 34, T. 147 N., R. 38 W., Crookston, Minnesota.

From this application and accompanying exhibits the following material facts are gathered. The township plat was filed in the local office June 10, 1884. On the 13th of the same month Steenerson filed pre-emption declaratory statement No. 9018 for the land described, alleging settlement September 12, 1883, and on the 1st of November, 1884, he made the cash entry in question.

September 24, 1885, said entry was held for cancellation on the report of Special Agent John F. O'Brien to the effect that the improvements on the claim were meagre and of little value, that the house was uninhabit-

able, that but little breaking had been done, and that the entry was made in the interest and for the benefit of the Clear Water Land and Logging Company, of which claimant was a member, and that said company had conspired to get this and other lands in the vicinity unlawfully for the timber only, said Steenerson being a party to such conspiracy.

Upon Steenerson's application a hearing was ordered by your office letter "P," dated March 2, 1886. The local officers set the hearing for May 24, 1886, at which time the claimant appeared in person and by attorney, and the United States was represented by Special Agent N. B. Wharton. On motion of Special Agent Wharton, the case was adjourned to July 30, 1886, on which last day it was again adjourned until August 6, 1886, when the trial was had, lasting until August 9, 1886.

* * * * *

The record was then transmitted to your office, and on the 5th of March, 1887, you rendered a decision, in which, after reciting the substance of the special agent's original report in the case, you say :

The testimony is incompetent and unsatisfactory. . . . It is evident from the agent's report, and the testimony taken in the other Steenerson cases that the most material evidence was not brought out at the trial.

The case is accordingly remanded with directions to order a new hearing.

Appeal was taken from your said decision, which was denied, on the ground that the order for rehearing being a matter resting in your discretion was not appealable. Wherefore the present application.

It is urged by the claimant that the order for rehearing will work injury to him ; that his land lies about one hundred miles from the local office, and that a great part of said distance is over broken and unsettled country, either entirely without roads, or with roads in an almost impassable condition, thus rendering the trip extremely difficult, laborious and expensive ; that at the instance of the government he has already made three trips to the local office, with his witnesses, at each time being to great expense ; that he is a poor man, a farm laborer by occupation, and unable to bear the expense of a rehearing, because the former hearing and continuances have exhausted his means ; that some of his witnesses, by whom he can establish the legality and validity of his claim, have moved away and their whereabouts are now unknown to him ; that the government had a whole year to prepare for the former trial, had two continuances in order to get its witnesses there, and was represented at said hearing by several special agents, and should therefore be estopped from prosecuting the case further ; and that the theory upon which the case is prosecuted, to wit : The existence of a fraudulent conspiracy between claimant and the aforesaid corporation, has no foundation, but is false in fact.

It is a well established rule in land practice that the ordering of hearings or rehearings is a matter resting in the sound discretion of

the Commissioner of the General Land Office. In this case, conceding for the sake of the inquiry the truth of petitioner's statements, yet I am of opinion that he has made no sufficient showing why this rule should be disregarded.

The application is therefore denied.

PRIVATE CLAIM—LOCATION; PRACTICE.

RANCHO BUENA VISTA.

(On Review.)

Evidence of record, and easily accessible under proper effort in that direction, cannot be considered as "newly discovered" in support of an application for review. Inclosing the survey of a claim the "place of beginning" is the peremptory call which fixes the mathematical point where the survey must terminate, and to such call, others subordinate thereto must yield.

Acting Secretary Muldrow to Commissioner Sparks, July 19, 1887.

I have considered the application for review and modification of the departmental decision of April 5, 1887 (5 L. D., 559), in the matter of the survey of the Rancho Buena Vista, located in the county of San Diego, California; and have carefully weighed the arguments, oral and written, made by the respective counsel, and find no reason for changing the decision heretofore made.

The principal objection to the former decision is as to the location of the place of beginning which is declared to be "at the northwest corner of the garden of the Indian Felipe," in the language of the final decree of confirmation of said grant.

Counsel for claimants, whilst forced to concede that this is the exact language used by the decree, insists that the court "was misled into the use of the word [garden], because it had been used by the magistrate," who delivered juridical possession of the granted land under the Mexican government, and who, it is asserted, also, in using the word "garden," used it in a comprehensive sense, so comprehensive in fact that when that officer said in his report, "As we stood at one of the boundaries of the garden of the Indian Felipe, the line was drawn east," etc., he really meant that he was standing at one of the boundaries of the Rancho, now claimed as the northwest corner thereof, and more than a mile from the well known garden. To support this assertion, it is contended that the decree is ambiguous, because the fourth and last boundary line of the grant is made to run "north two thousand, five hundred varas, to the place of beginning, on a hill where there is a rock," and it is said that inasmuch as there is no "hill where there is a rock," "at the NW. corner of the garden," some other point, answering the very vague and indefinite description of a hill with a rock, must be

selected as the place of beginning. A "hill where there is a rock" has been selected more than a mile west of the garden, and it is said that this point is identified as the proper beginning and ending of the Buena Vista grant, because at that point, or not far from there, has been located the southeast corner of the Rancho Guajome, whose lines, in the language of the decree confirming that grant, commence "at the point known as the last boundary line of the Indian Felipe," thence running north, etc. And it is this reference in the Guajome grant to the "last boundary line of the Indian Felipe" that is claimed to be newly discovered evidence, properly admissible to explain the alleged ambiguity in the decree confirming and bounding the Buena Vista grant.

The matter referred to is not "newly discovered evidence" but evidence which has been on the records of the land office for many years, and could have been obtained at any time by proper efforts in that respect. If admitted and considered in the present case, it could not change the result therein, as it only shows that the beginning of the Guajome grant was dependent upon the last line of the Buena Vista grant; not that the Buena Vista grant was in any way dependent for its location upon the other grant. Consequently, if the lines of the two grants do not connect or fail to coincide as provided in the Guajome decree, the error naturally arose from a failure to await the proper survey and location of the Buena Vista grant before surveying and patenting the other and dependent grant. And the fact that the beginning of the Guajome grant was established in a survey thereof at a point which had not then been officially recognized as the "last boundary of the Indian Felipe," only proves that said grant was improvidently surveyed; and presents no justification for disregarding the calls in the decree of the Buena Vista grant, in order to make its lines connect or coincide with those of the Guajome grant. Two wrongs do not make a right in law, any more than in ethics.

But, as was said in the former decision, there is no ambiguity in the Buena Vista decree, as to the point of beginning. This is plainly, clearly, and beyond controversy fixed at the northwest corner of the old garden. And it can be established at no other point without utterly ignoring the plain language and violating the unmistakable intent of the court, as shown thereby.

It is possible that the conjecture of counsel is true; and that when the court said "garden", that tribunal really meant "Rancho." But there is nothing in the case beyond vague surmise on which to base the possibility of such error. If such error was committed, it could have been readily corrected at the time, or afterwards by proper proceedings on appeal. The confirmees have had their day in court, when such correction could have been made. At all events, this Department is without authority to change or reform that decree.

It is asserted that the place of beginning as thus established at the northwest corner of the garden, and the place of beginning as described

in the fourth and last boundary of the decree, are not the same; and that in such conflict of description that last given must dominate. I do not concur in either of these views.

The decree describes the first boundary as "commencing at the northwest corner of the garden of the Indian Felipe, and running east 2,500 varas to the boundary line of Lorenzo Soto;" and describes the last boundary line as "running north 2,500 varas to the place of beginning, on a hill where there is a rock." Here is no patent ambiguity or apparent conflict; but the assertion is made that the northwest corner of the old garden is not "on a hill where there is a rock," but is in a valley. There is no sufficient proof before me to sustain this assertion; but even were it so, it could not change my views. About the location of the garden there has been and is no controversy or question; its northwest corner is a mathematical point, fixed by the court as the place of beginning, and is easily ascertainable. When ascertained, the fourth and last line must necessarily end at that mathematical point—the place of beginning—whether it be on "a hill where there is a rock," on a hill where there is no rock, on a plain where there is neither rock nor hill, or in a valley or ravine. The "place of beginning" is the peremptory call; the rock and hill being subordinate thereto must be disregarded, if necessary, to gratify the important call, without which the survey can not be closed and made complete.

Seeing no error in the former decision, the application for review is denied.

INDIAN ALLOTMENTS—OLD COLUMBIA RESERVATION.

The provisions of the act of July 4, 1884, do not constitute a bar to the allowance of allotments on the Old Columbia Reservation under the fourth section of the act of February 8, 1887.

*Acting Secretary Muldrow to the Commissioner of Indian Affairs,
July 22, 1887.*

Referring to your letter of the 16th instant upon the subject of the making of allotments to Indians occupying land formerly a part of the old Columbia reservation, under the general allotment act of February 8, 1887, I enclose herewith for your information and guidance an opinion of 21st instant, rendered by the Honorable Assistant Attorney General for this Department, to whom your letter was referred.

OPINION OF ASSISTANT ATTORNEY GENERAL MONTGOMERY.

I am in receipt by reference of the communication of Hon. A. B. Upshaw, Acting Commissioner of Indian Affairs, bearing date 16th instant, requesting an opinion as to whether or not, "under a proper construction of the act of July 4, 1884, allotments could be made to Indians on the Old Columbia Reservation under the 4th section" of "An act to provide for the allotment of lands in severalty to Indians," etc. (Approved February 8, 1887, 24 Stat., 388).

Section four of said severalty act—among other things—provides :

That where any Indian now residing upon a reservation, or for whose tribe no reservation has been provided by treaty, act of Congress, or executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in this act for Indians residing upon reservations; and when such settlement is made upon unsurveyed lands, the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto; and patents shall be issued to them for such lands in the manner and with the restrictions as herein provided. (Act of 1887, p. 389).

The act approved July 4, 1884 (23 Stat., 79) the same above referred to, provides that—

For the purpose of carrying into effect the agreement entered into at the city of Washington on the seventh day of July, eighteen hundred and eighty-three, between the Secretary of the Interior and the Commissioner of Indian Affairs and Chief Moses and other Indians of the Columbia and Colville reservations, in Washington Territory, which agreement is hereby accepted, ratified, and confirmed, including all expenses incident thereto, eighty-five thousand dollars, or so much thereof as may be required therefor, to be immediately available: *Provided*, That Sarsopkiu and the Indians now residing on said Columbia reservation shall elect within one year from the passage of this act whether they will remain upon said reservation on the terms therein stipulated or remove to the Colville reservation: *And provided further*, That in case said Indians so elect to remain on said Columbia reservation the Secretary of the Interior shall cause the quantity of land therein stipulated to be allowed them to be selected in as compact form as possible, the same when so selected to be held for the exclusive use and occupation of said Indians, and the remainder of said reservation to be thereupon restored to the public domain, and shall be disposed of to actual settlers under the homestead laws only, except such portion thereof as may properly be subject to sale under the laws relating to the entry of timber lands and of mineral lands, the entry of which shall be governed by the laws now in force concerning the entry of such lands.

As will be observed, said section four of the act of February 8, 1887, begins by saying "That where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty act of Congress, or executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise *appropriated*, he or she shall be entitled," etc.

The question, then, to be solved is this: Does the above language, found in the act of July 4, 1884 (declaring that certain lands which had belonged to the "Columbia Reservation" shall be "restored to the public domain, and shall be disposed of to actual settlers under the homestead laws only, etc.), constitute such an "appropriation" of said lands as to take them out of the operation of the above quoted provision of said Indian severalty act.

In the case of *Wilcox v. Jackson* (13 Peters, 498), the United States supreme court said :

Whensoever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of the public lands, and no subsequent law or proclamation or sale would be construed to embrace it, or to operate upon it, although no reservation were made of it.

Was it then the intention of Congress that said act of July 4, 1884, should operate as a severance of the lands in question from the mass of the public domain ? On the contrary, the language used would seem to indicate exactly an opposite purpose : namely, a purpose to add to the public domain lands which theretofore had been severed therefrom. For it will be observed that, after providing "That in case said Indians elect to remain on said Columbia Reservation, the Secretary of the Interior shall cause the quantity of land therein stipulated to be allowed them to be selected in as compact a form as possible," etc., the act then goes on to say : "And the remainder of said reservation to be thereupon restored to the public domain."

If, then, Congress intended by said act to restore said lands to the public domain, it clearly follows that it did not intend thereby to perpetuate their separation from the public domain.

Even conceding that title to said lands can only be acquired in the manner pointed out in last named act ; still it seems to me that allotments to non-tribal Indians (settlers thereon) under the severalty act of 1887, would be clearly within the spirit and purpose of said act of 1884. These lands, says that act "Shall be disposed of to actual settlers under the homestead laws."

Now, it will be observed that in order to entitle a non-tribal Indian to hold land under the Indian severalty act, he must first "make settlement" thereon. In other words, he must be an actual settler upon the land. And this appears to have been the very class of persons (to wit, actual settlers) for whose benefit the above quoted provision of the act of 1884 seems to have been intended. In other words, if said act of 1884 resulted—at one and the same time—in adding said lands to the public domain, and in severing them therefrom, by appropriating them to a particular use—namely the use of actual settlers—then it seems to me that non-tribal Indians settled thereon most clearly come within the description of persons for whose benefit said lands stand reserved.

It is true that said act of 1884—except in the case of mineral or timber lands—requires that title shall be acquired under "the homestead laws." But the expression "homestead laws" has more than once been interpreted by this Department in a generic sense, so as to include other settlement laws, besides the homestead law proper. The fact that Congress chose to employ the term "homestead laws" would in itself seem to indicate an intention to include a class of laws, rather than a single statute.

This construction moreover appears to be in accord with the apparent purpose of Congress to allow all the Indians formerly belonging to the Columbia Reservation—who might choose to do so—to establish themselves permanently upon what formerly constituted their reservation lands. For, as will be observed, said act of 1834 provides:

That in case said Indians so elect to remain on said Columbia Reservation, the Secretary of the Interior shall cause the quantity of land therein stipulated to be allowed them to be selected in as compact a form as possible, the same when so selected to be held for the exclusive use and occupation of said Indians, etc.

This proviso shows clearly that Congress had no desire to exclude from settlement upon these lands any of said Indians who might elect to make such settlement.

Therefore, when it was enacted (February 8, 1837) that where non-reservation Indians—"Shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled . . . to have the same allotted," etc.—my opinion is that it was intended by and under said act to confer upon all Indians of the class indicated a right to make settlement upon and acquire title to any public lands, open to settlement, or in other words, any public lands not already appropriated to some use or purpose incompatible with such Indian settlement and the acquisition of such title. Neither do I think that said act of July 4, 1834, constitutes any such appropriation, as that mentioned in said severalty act of February 8, 1837.

MILITARY RESERVATION—ACT OF FEBRUARY 14, 1853.

FORT ELLIS.

The statutory limitation of February 14, 1853, as to the amount of land that may be withdrawn for a military reservation is only applicable within the territorial limits of Oregon.

Acting Secretary Muldrow to J. A. Evans, Fort Ellis, Montana, July 22, 1887.

By letter of the 11th instant, you inquire whether the late decision of this Department, in the matter of the Fort Boise Hay Reservation, dated July 7, 1887 (6 L. D., 16), is applicable to any part of the Fort Ellis reservation in Montana.

You also state that said decision "has caused a number of citizens of Bozeman to locate claims" on said reservation.

In reply, I have to inform you that the decision referred to in no way affects the disposition of the Fort Ellis reserve. The decision in that case was based on the provision of section nine of the act of February 14, 1853 (10 Stat., 158)—

That all reservations heretofore as well as hereafter made in pursuance of the fourteenth section of the act to which this is an amendment, shall, for magazines, arsenals, dock yards, and other needful public uses, except for forts, be limited to an amount not exceeding twenty

acres for each and every of said objects at any one point or place, and for forts to an amount not exceeding six hundred and forty acres at any one point or place.

That act was entitled :

An act to amend an act entitled "An act to create the office of Surveyor General of the public lands in Oregon, and to provide for the survey and to make donations to the settlers of the said public lands," approved September 27, 1850.

Said act of 1850, known as the "Donation act," applied only to the Territory of Oregon as then constituted. (9 Stat., 496.) The same is true of the amendatory act.

The boundaries of the Territory as they then existed are found in the act establishing the territorial government of Oregon (9 Stat., 323), as follows :

That from and after the passage of this act, all that part of the territory of the United States which lies west of the summit of the Rocky Mountains, north of the forty-second degree of north latitude, known as the Territory of Oregon, shall be organized into and constitute a temporary government by the name of the Territory of Oregon.

The Fort Ellis reservation is *east* of the summit of the Rocky Mountains, was not in the Territory of Oregon, and does not come within the purview of the statute limiting military reservations to six hundred and forty acres for each fort.

Any attempt, therefore, to initiate a claim to the lands in Fort Ellis reserve, based on said decision in the Fort Boise case, has no foundation in law.

You will please notify such claimants of the contents hereof.

RAILROAD GRANT—LANDS RELINQUISHED BY THE STATE.

SIoux CITY & ST. PAUL R. R. Co.

The grant of May 12, 1864, to the State of Iowa, to aid in the construction of the two railroads named therein was a grant in place, and of a moiety for each road within the common granted limits, and no indemnity can be allowed either road for lands lost by reason of the moiety granted to the other.

Except on the final completion of the whole road, there is no authority under the grant for patenting lands without the governor's certificate that ten consecutive miles of road have been completed in a good, substantial and workmanlike manner.

No lands were earned by the construction of a fractional part of a ten mile section, the governor's certificate not covering the same, and the whole road not being completed.

The lands not earned under the grant, but for which patent was illegally issued, having been relinquished by the State, are restored to the public domain and opened to entry and settlement.

Secretary Lamar to Commissioner Sparks, July 26, 1887.

I am in receipt of your report and recommendation, dated February 17th last, relative to certain lands in Iowa which had been patented to

that State, and which have been certified back to the United States in manner and for the reasons hereinafter mentioned.

Congress, by act approved May 12, 1864 (13 Stat., 72), granted to the State of Iowa certain lands to aid in the construction of a railroad from Sioux City in said State to the southern boundary of the State of Minnesota. It also by the same act made a grant for the use and benefit of the McGregor Western Railroad Company, in that State.

It also provided for indemnity lands in lieu of such lands within the granted limits as failed to pass under the grant by reason of their having been sold, reserved or otherwise appropriated, or to which the right of homestead settlement or pre-emption had attached.

The act of Congress provided in the fourth section thereof that—

When the governor of said State shall certify to the Secretary of the Interior that any section of ten consecutive miles of either of said roads is completed in a good, substantial and workmanlike manner as a first class railroad, then the Secretary of the Interior shall issue to the State patents for one hundred sections of land for the benefit of the road having completed ten consecutive miles as aforesaid,

this to be repeated until said roads, or either of them, are completed. Said Section four further provides : .

That if the said roads are not completed within ten years from their several acceptance of this grant, the said lands, hereby granted and not patented, shall revert to the State of Iowa for the purpose of securing the completion of the said roads within such time, not to exceed five years, and upon such terms as the State shall determine; *And provided, further*, that said lands shall not, in any manner, be disposed of or encumbered, except as the same are patented under the provisions of this act; and should the State fail to complete said roads within five years after the ten years aforesaid, then the said lands undisposed of shall revert to the United States.

You state that the records of your office show that the State accepted the grant April 3, 1866, and that the Sioux City and St. Paul Railroad Company, on September 20, 1866, accepted that portion of the grant conferred upon it by the State, to wit, that for the road between Sioux City and the south line of the State of Minnesota. Also that a map of definite location of said road, certified by the governor of the State was received at your office, with a letter from the Secretary of the Interior, dated July 17, 1867, whereupon, by letter of August 26 following, received at the local office at Sioux City, September 2, 1867, the lands on the line of said road as definitely located were ordered withdrawn for the benefit of the company under the grant.

You further state that the length of the line thus located was eighty-three miles and fifty-two rods, and that certificates made by the governor of Iowa, as to construction of the road in compliance with section four of the granting act, and on file in your office, are as follows:—

One dated July 26, 1872, covering two sections of ten miles each.

One dated August 10, 1872, for one section of ten miles.

One dated February 4, 1873, for two sections of ten miles.

This makes a total of fifty miles of road—five sections of ten miles each—certified under section four as completed.

It appears, however, that a map showing the road as constructed from the south line of the State of Minnesota to Le Mars, Iowa, a distance of fifty-six and a quarter miles, was certified by the governor of Iowa February 4, 1873, the date of the last above mentioned certification by ten mile sections, and was duly filed in your office, having been transmitted by departmental letter, dated February 10, 1873.

Your report sets out that so far as the records of your office show the above-mentioned certificates indicate the extent of the road constructed by the company, and that no claim of any further construction has been made.

As already stated, the company accepted its grant September 20, 1866, to complete its road, failing in which reversion to the State was provided for; and should the State fail to complete the road within five years from the expiration of the ten years aforesaid, to wit, by September 20, 1881, provision was made for reversion to the United States.

As shown by the records of your office, the total length of the line of road as located was eighty-three miles, fifty-two rods. The total length of road certified as constructed is fifty-six and a quarter miles; and the total length certified in sections of ten miles each, as completed in accordance with section four of the act, is fifty miles.

From what has been said, it is manifest that all the lands granted have not been earned by the company, or the State. Not allowing for any losses, and presuming the line of road to be a direct line, the total number of acres, which, at one hundred sections for every ten miles completed and certified under section four of the act, could be earned, would be, for the fifty miles so certified, 320,000.

Of this amount 70,345.67 acres, as shown by the records of your office, fall within the common ten miles limits of both grants, that is of the grant to this company and that to the McGregor Western Railroad Company under the same act, and the supreme court has decided that each company took a moiety of said land. *Sioux City and St. Paul R. Co. v. C., M. & St. P. Ry. Co.* (117 U. S., 406). The half of 70,345.67 acres is 35,172.83 acres.

It is claimed, however, on behalf of the Sioux City Company that it is entitled to indemnity for the 35,172.83 acres then lost by reason of the grant for the other company. I am unable to concede the correctness of this claim.

I do not think that Congress granted or intended to grant more than a moiety to each company in the common granted limits. To say that it intended to do more than this would be to say, in effect, that in so far as the ten miles limits of the two grants overlap, the purpose of the granting act was to make what would amount to a double grant. Each company (the Sioux City and St. Paul, and the Chicago, Milwaukee and St. Paul, which succeeded to the grant made for the use and benefit of

the McGregor Western Company,) got a moiety of the lands in odd numbered sections within the common granted limits. Now, should there be allowed to each company indemnity for the moiety lost by grant for the other, a quantity of land equivalent to all the odd and even numbered sections in said common granted limits would be passed under the granting act.

This, in my judgment, would not be justified by any proper construction of the act, nor can I conceive it to have been intended by Congress.

The grant was of a moiety for each road within the common granted limits of the two roads. Either this is true, or Congress by the same act twice granted the same lands. To say that it did, or intended to do, this, would be to say that it acted unreasonably, or without a proper understanding of what it was doing. I am satisfied that the grant by the act of 1864 was, so far as the granted limits of the two roads overlap, a grant of "every alternate section of land designated by odd numbers for ten sections in width on each side of said roads," for the common benefit of the roads. This accords with the view expressed by the supreme court in the case of *St. Paul and Sioux City R. R. Co. v. Winona and St. Peter R. R. Co.* (112 U. S., 720.)

Now, since indemnity is allowed only for lands granted, or intended to be granted, and lost from the grant, and since in the common ten miles of the two roads only a moiety was granted for the benefit of each, it follows that the Sioux City Company, one of the beneficiaries under the grant, has no legal claim for indemnity on account of the moiety granted for the benefit of the other company.

Deducting from 320,000 acres, which would be the full amount possible to be earned under the grant for the fifty miles of road certified as required by section four of the granting act if there were no moiety grant, the moiety of 35,172.83 acres granted and awarded to the Chicago, Milwaukee and St. Paul Company, and there remain 284,827.17 acres as the maximum amount which could be earned by the company for the fifty miles of road certified as completed in accordance with section four of the granting act.

It is further urged in behalf of the company that, "for the six and one fourth miles of continuous constructed road from the end of the five ten-mile sections to Le Mars, the company are entitled to lands at the rate of ten sections per mile, namely, 40,000 acres, and in any adjustment of the grant upon an equitable basis should be allowed that amount of land."

If this claim is well founded, it would add 40,000 acres to the 284,827.17 above mentioned, making the total number of acres which the company has earned, 324,827.17. But I am unable to conclude that the company has earned any lands by reason of its construction of the six and a quarter miles referred to.

Under the provisions of that portion of section four of the act of 1864, herein quoted, it is clear that there is no authority for patenting

lands under this grant, except upon certificate of the governor of the State to this Department that ten consecutive miles of road have been "completed in a good, substantial and workmanlike manner."

The only exception to the manner of disposing of the lands as above indicated is, that which may apply when the road is completed.

The statute would seem to provide for the disposition of the lands for a fractional part of ten miles in that case, for it says that the whole of the lands granted shall then be patented.

This road has not been completed, but stops at Le Mars, about twenty-six miles short of the point (Sioux City) to which under the grant it should have been constructed. The reasons given for not completing the road certainly furnish no reason for disposing of the public lands otherwise than in conformity with the law.

The company stopped the building of its uncompleted road with full knowledge of the requirements of the granting act as to the conditions on which it could get the lands.

It is not, therefore, in position to complain because it can not get lands for the six and a quarter miles of road in question, and must accept the legal consequences of its own act. The company has heretofore practically conceded its want of title or valid claim to lands on account of this six and a quarter miles of road, for it has been to Congress asking for legislation which would give it the lands for said six and a quarter miles, and it opposed a bill which proposed to refer the questions relative to the status of said lands to the courts for judicial determination. See report No. 45, Senate Committee on Public Lands, 49th Congress, 1st Session. A careful consideration of the granting act convinces me that there is no authority of law for patenting any lands on account of the six and a quarter miles of road, and that no lands have been earned by the construction thereof.

The conclusion from the foregoing must be that the company has earned under the grant of Congress not to exceed 284,827.17 acres, already mentioned as the maximum amount to which it is entitled for the completion of five sections of ten miles each of its road.

There have been patented to the State for this company 407,910.21 acres, less forty acres patented twice, which leaves 407,870.21 acres actually patented. Deducting from this amount the 284,827.17 acres earned, and we have left 123,043.04 acres, which, it appears, were not earned under the terms of the grant, and patents for which were issued to the State improperly and without authority of law. My predecessor, Secretary Teller, in a letter to the governor of Iowa, under date of February 6, 1883, relative to these lands, spoke of the patents in as far as they purported to convey lands not earned, as having been "issued inadvertently, as the Secretary of the Interior had no authority under the granting act (section 4) to issue patents, except upon completion of any section of ten consecutive miles." The patents to the State were issued between October 1, 1872, and June 8, 1877.

It appears that of the 407,910.21 acres patented the State has withheld from the company 85,457.40 acres. This leaves 322,452.81 acres as the amount patented or certified by the State to the company, an excess of 37,625.64 acres over and above the maximum amount (284,827.17 acres) to which it was entitled under the grant.

But the supreme court, in a contest between this company and the Chicago, Milwaukee and St. Paul Company (117 U. S., 406, cited *supra*,) awarded to the latter 41,687.52 acres of the 322,452.81 acres which had been patented to this company. This leaves still in the Sioux City company under patents from the State 280,765.29 acres, while, as has been stated, it appears to be entitled to 284,827.17 acres. Consequently there remain still due the company at the most 4,061.88 acres, to be gotten out of the 85,457.40 acres which have been patented to the State, but by the State withheld from the company.

It may here be remarked that 37,747.89 acres of the above mentioned 85,457.40 acres were by the supreme court (*supra*) awarded to the Milwaukee company. But there is still left 47,709.51 acres out of which to get the 4,061.88 acres to which it appears the company is *prima facie* yet entitled. The difference between these amounts is 43,647.63 acres, and this is the quantity of land still in the State by patent from the United States.

The legislature of the State, by act of March 16, 1882, declared a forfeiture as to the Sioux City company in the following words, to wit:

That all lands and right to lands granted or intended to be granted to the Sioux City and St. Paul Railroad Company by said act of Congress and of the General Assembly of the State of Iowa, which have not been earned by said railroad company by a compliance with the conditions of said grant, be and the same are hereby absolutely vested in said State as if the same had never been granted to said railroad company.

Having thus declared a forfeiture, the State then by act of its General Assembly, approved March 27, 1883, relinquished and conveyed to the United States the lands so forfeited to it by the act of March 16, 1882, and authorized and directed the governor to certify to the Secretary of the Interior the lands which had been patented to the State for the company, excepting lands in the counties of Dickinson and O'Brien.

Such certification by the governor has been duly performed, and his certificate is before me. It embodies the act of the legislature, approved March 27, 1884, which authorized it, and also a complete list of the lands certified and conveyed back to the United States, describing them by section, township and range, and giving the area of each separate tract.

The aggregate quantity of land so certified and conveyed is 26,017.33 acres, lying in the counties of Woodbury, Sioux and Plymouth. The first section of the act of the legislature, authorizing the certification, reads as follows:

That all lands and all rights to lands resumed and intended to be resumed by chapter one hundred and seven (107) of the acts of the Nine -

teenth General Assembly of the State of Iowa are hereby relinquished and conveyed to the United States.

Section 2 contains the following :

The governor of the state of Iowa is hereby authorized and directed to certify to the Secretary of the Interior all lands which have heretofore been patented to the State to aid in the construction of said railroad, and which have not been patented by the State to the Sioux City and St. Paul Railroad Company, and the list of lands so certified by the governor shall be presumed to be the lands relinquished and conveyed by section one of the act.

The certification by the governor under this act was not made without an effort on the part of the railroad company to prevent it. He was enjoined by the company, but the injunction was dissolved, and the certification followed.

The company is still opposing re-assertion of title by the United States, and is now here by its president and by counsel, claiming in effect that the grant for the benefit of the company was one of quantity and not of lands in place, and that therefore the company has earned the lands in question, notwithstanding they are outside the fifty mile terminal limits.

I have carefully examined the papers filed by Mr. Drake, the president of the company, and the argument of counsel, and find therein nothing which convinces me, or leads me to think that the company is entitled to an acre of the land certified and conveyed as herein described to the United States from lands which had been patented by the last named to the State of Iowa. On the contrary, I am fully satisfied that said lands were erroneously patented, and that the company has no legal claim to them or any of them under the grant of 1864, or any other law.

The grant is clearly one in place, and not one of quantity. This view is in accordance with the uniform holding of the Department with reference to grants of this character, and need not here be discussed.

I must conclude, after a careful examination of the matter as presented, that neither the State of Iowa, nor the Sioux City and St. Paul Railroad Company ever had any title under the granting act of 1864 to the lands in question beyond the *prima facie* legal title which would appear from the face of the patents, which, so far as these lands are concerned, were improperly and illegally issued. This title, such as it was, had gone no further than the State, for it had not patented or certified the lands in question to the company. The State having relinquished and reconveyed to the United States such title as it had, I have no hesitation in concurring in your recommendation that the lands so certified and conveyed be restored to entry under the settlement laws of the United States. You will therefore treat them as public lands, and they will be thrown open to settlement and entry, as are other public lands of the United States.

*RAILROAD GRANT—LANDS EARNED BY CONSTRUCTION—LOCATION.***SIoux CITY & ST. PAUL R. R. CO. AND CHICAGO, MILWAUKEE & ST. PAUL RY. CO.**

By the terms of the act of May 12, 1864, patents were authorized on the governors, certificate that ten consecutive miles of road have been constructed, and lands so patented, for road actually built, were earned under the grant though the whole line of road was not completed.

No lands were earned by the construction of a fractional part of a ten mile section, the governor's certificate not covering the same, and the whole road not being completed.

The grant to the two roads was of a moiety for each road within the common granted limits and neither road has any claim for indemnity on account of the moiety granted to the other.

Any question as to actual construction on the line of definite location must be regarded as finally settled by the acceptance of the road as constructed, the adjustment of the grant, and the issuance of patents thereunder.

As under the grant the two roads named therein were required to intersect at a given point, a map showing the location of one of said roads before such point of intersection could be ascertained, must be held as indicating a preliminary line, and not debarring a change of location, if made necessary in order to comply with statutory requirements as to course and direction.

Suit for the recovery of title is deemed advisable in the matter of certain lands patented to the State of Iowa for the benefit of the Sioux City & St. Paul Railroad Company in excess of those actually earned under the grant.

Secretary Lamar to Commissioner Sparks, July 26, 1887.

In January last an application was filed in this Department in behalf of certain settlers in O'Brien county, Iowa, asking that suit be commenced and prosecuted in the name of the United States to assert title to about 55,297.21 acres of land in said O'Brien county, claimed by the Sioux City and St. Paul Railroad Company, and the Chicago, Milwaukee and St. Paul Railway Company, respectively, under and by virtue of the grant to the State of Iowa by act of Congress, approved May 12, 1864 (13 Stat., 72).

Applicants aver that neither of the companies mentioned has earned the lands in question, nor any of them; that they, the said applicants, are settlers upon said lands, and that they are seeking to acquire title to the same under the settlement laws of the United States.

Section one of said act of 1864 enacts:

That there be, and is hereby, granted to the State of Iowa, for the purpose of aiding in the construction of a railroad from Sioux City, in said State, to the south line of the State of Minnesota, at such point as the said State of Iowa may select between the Big Sioux and the west fork of the Des Moines river; also to said State for the use and benefit of the McGregor Western Railroad Company, for the purpose of aiding in the construction of a railroad from a point at or near the foot of Main Street, South McGregor, in said State, in a westerly direction, by the most practicable route, on or near the forty-third parallel of north latitude, until it shall intersect the said road running from Sioux City to the Min-

nesota State line, in the county of O'Brien, in said State, every alternate section of land designated by odd numbers for ten sections in width on each side of said roads; but, in case it shall appear that the United States have, when the lines or routes of said roads are definitely located, sold any section or any part thereof granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected, for the purposes aforesaid, from the public lands of the United States nearest to the tiers of sections above specified, so much land in alternate sections, or parts of sections, designated by odd numbers, as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached, as aforesaid, which lands thus indicated by odd numbers and sections, by the direction of the Secretary of the Interior, shall be held by the State of Iowa for the uses and purposes aforesaid: *Provided*, That the lands so selected shall in no case be located more than twenty miles from the lines of said roads: *Provided, further*, That any and all lands heretofore reserved to the United States by any act of congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved, and excepted from the operation of this act, except so far as it may be found necessary to locate the routes of said roads through such reserved lands, in which case the right of way shall be granted, subject to the approval of the President of the United States.

Section four enacts:

That the lands hereby granted shall be disposed of by said State, for the purposes aforesaid only, and in manner following, namely: When the governor of said State shall certify to the Secretary of the Interior that any section of ten consecutive miles of either of said roads is completed in a good, substantial, and workmanlike manner as a first-class railroad, then the Secretary of the Interior shall issue to the State, patents for one hundred sections of land for the benefit of the road having completed the ten consecutive miles as aforesaid. When the governor of said State shall certify that another section of ten consecutive miles shall have been completed as aforesaid, then the Secretary of the Interior shall issue patents to said State in like manner, for a like number; and when certificates of the completion of additional sections of ten consecutive miles of either of said roads are, from time to time, made as aforesaid, additional sections of lands shall be patented as aforesaid, until said roads, or either of them, are completed, when the whole of the lands hereby granted shall be patented to the State for the uses aforesaid and none other: *Provided*, That if the said McGregor Western Railroad Company, or assigns, shall fail to complete at least twenty miles of its said road during each and every year from the date of its acceptance of the grant provided for in this act, then the State may resume said grant, and so dispose of the same as to secure the completion of a road on said line and upon such terms, within such time as the state shall determine: *Provided, further*, That if the said roads are not completed within ten years from their several acceptance of this grant, the said lands hereby granted and not patented shall revert to the State of Iowa for the purpose of securing the completion of the said roads within such time, not to exceed five years, and upon such terms as the state shall determine: *And pro-*

vided, further, That said lands shall not in any manner be disposed of or encumbered, except as the same are patented under the provisions of this act; and should the State fail to complete said roads within five years after the ten years aforesaid, then the said lands undisposed of as aforesaid shall revert to the United States.

The State of Iowa, by act of its legislature approved April 3, 1866 (Session Laws, 1866, Chap. 134), accepted the grant of 1864, and conferred upon the Sioux City and St. Paul Railroad Company, a body corporate existing under and by virtue of the State of Iowa, so much of the grant by Congress as related to a line of road from Sioux City to the south line of the State of Minnesota. April 20, 1866, another act of the legislature was approved, reiterating the acceptance by the State of the grant of Congress, and announcing that any lands patented to the State under the provisions of the act of Congress would be held by it in trust for the benefit of the railroad company entitled thereto, and should be passed to such company "as shall be ordered by the legislature." (Session Laws, 1866, Chap. 144.)

September 19, 1866, the Sioux City and St. Paul Railroad Company accepted the grant, and in July, 1867, filed in this Department a map showing the line of its road as definitely located from Sioux City to a point in Sec. 12, T. 100 N., R. 41 W., on the south line of Minnesota. Said line of road as located is eighty-three miles and fifty-two rods in length. The map thus filed was accepted by this Department as "the basis for the adjustment of the land grant."

August 26, 1867, the Commissioner of the General Land Office withdrew from market the odd numbered sections within the ten and twenty miles limits of the line of the road.

The Sioux City Company began at the Minnesota State line to construct its road and built south towards Sioux City. July 26, 1872, the governor of the State of Iowa certified, as provided in the fourth section of the act of Congress making the grant, that two sections of ten miles each of the road had been constructed as required by said act. August 10, 1872, he certified in like manner to the completion of another section of ten miles; and on February 4, 1873, he certified to the completion of two more sections of ten miles each, making in all fifty miles of road completed and certified as required.

Prior to January 1, 1873, the company had constructed a continuous line of road from the Minnesota State line to Le Mars, a distance of fifty-six and a quarter miles, and a map of constructed road for the distance named was certified by the governor February 4, 1873, and filed in this Department July 10, 1873. Patents were issued to the State for the benefit of the Sioux City and St. Paul Railroad Company as follows:

	Acres.
October 1, 1872, for list embracing.....	191,464.04
June 17, 1873, " " ".....	205,374.76
Jan'y 25, 1875, " " ".....	10,911.41
June 4, 1877, " " ".....	160.00
Total.....	407,910.21

Of this amount it appears that forty acres were patented twice. The quantity actually patented to the State was therefore forty acres less than the above footing makes it appear, or 407,870.21 acres. Of the land so patented, it appears 212,067.66 acres are within the ten miles, or granted limits, and 195,842.55 were patented as indemnity.

As only five sections of ten miles each of the road had been certified by the governor as completed, the maximum amount for which, under section four of the granting act, authority was given to issue patents to the State, was 320,000 acres. 407,910.21 less 320,000 leaves 87,910.21 patented inadvertently and without authority of law.

March 13, 1874, the Iowa legislature passed an act authorizing the governor to certify to the Sioux City Company all the lands then held in trust for the benefit of said company. (Laws of Iowa, 1874, Chap. 34.)

The State passed title to the railroad company for all of the 407,910.21 acres, except 85,457.40 acres, which it withheld and which have never been certified to the company, though it still claims title to them, or to such of them as have not, by the decision of the supreme court of the United States (117 U. S., 406) been awarded to the Chicago, Milwaukee and St. Paul Railway Company.

The Chicago, Milwaukee and St. Paul Railway Company, having by legislation of the State of Iowa become the successor of the McGregor Western Railroad Company as beneficiary under the grant of Congress, made by the act of 1864 (the same act under which the Sioux City Company claims), completed its line of road to the point of intersection with the line of the Sioux City Company at Shelton, in O'Brien county.

For the sake of brevity, the Sioux City and St. Paul Railroad Company will be referred to in the further discussion of this case as the Sioux City Company, and the Chicago, Milwaukee and St. Paul Railway Company as the Milwaukee Company.

The act of 1864 required that the point of intersection of the two roads named therein should be in O'Brien county.

The limits of the two lines were thus made to overlap for a considerable distance. The lands in said overlapping limits became the subject of controversy between the Milwaukee Company and the Sioux City Company, the first named claiming that there were in the overlapping limits of the two roads 189,184.50 acres, which had been mistakenly patented to the State of Iowa for the benefit of the Sioux City Company, and which should have been patented for the benefit of the Milwaukee Company. That, of the said 189,184.50 acres thus wrongfully and mistakenly patented to the State, 112,280.08 acres had been wrongfully and mistakenly certified by the governor of Iowa to the Sioux City Company.

The Milwaukee Company, complainant, asked that this patent from the United States, and the conveyance from the State to the Sioux City

Company be canceled and set aside, so far as the same conveyed any title to the defendant company, and that it (the complainant) should recover the lands.

The case finally came before the supreme court of the United States on cross appeals, neither company being satisfied with the decree of the circuit court, which had awarded to each, one undivided half of the lands in dispute.

The supreme court, under date of March 29, 1886, (117 U. S., 406,) after stating that the quantity of lands within the overlapping limits of the two roads was, as shown by the record, 189,595.24 acres, decided that they should be awarded as follows :

Lands within the common granted and common indemnity limits, to each company an undivided half: lands within the granted limits of the Milwaukee road and within the indemnity limits of the Sioux City road, all to the Milwaukee Company; lands within the granted limits of the Sioux City road and within the indemnity limits of the Milwaukee road, all to the Sioux City Company.

The circuit court was instructed to render a decree accordingly, which it subsequently did. The effect of the decree was to dispose of the 189,595.24 acres by awarding to the Sioux City Company 110,159.94 acres, and to the Milwaukee Company 79,435.41 acres.

In the meantime, while the suit was pending in the courts, the Iowa legislature passed an act, approved March 16, 1882, resuming all the lands and rights conferred upon the Sioux City Company by the act of Congress of May 12, 1864, which had not theretofore been earned by said company (Laws of 1882, Chap. 107).

March 27, 1884, another act of the legislature was approved, which by its first section relinquished and conveyed to the United States the land resumed and intended to be resumed by the act of 1882 (*supra*), and by its second section it provided for the certification by the governor to the Secretary of the Interior of all lands which had been patented to the State, but which had not by the State been patented to the Sioux City Company; but nothing in said act was to be construed as applying to lands situated in the counties of Dickinson and O'Brien. Said act also provided that the list of lands so certified by the governor should be presumed to be the lands relinquished and conveyed by the first section thereof. (Iowa Laws of 1884, Chap. 71.)

January 12, 1887, the governor of Iowa duly certified to this Department, in accordance with the act of the legislature above mentioned, a list of lands which had been patented to the State, but which had not by the State been transferred to the Sioux City Company. Said list embraces 26,017.33 acres in the counties of Plymouth, Sioux and Woodbury, and is now before me for consideration and action, but is not involved in the matter now being considered.

The Iowa legislation, authorizing the certification as above, followed and apparently was the result of a suggestion made by my predecessor,

Secretary Teller, in a communication, addressed by him to the Governor of Iowa, under date of February 6, 1883.

In that letter, after reciting certain facts relative to the granting act of 1864, and to the lands patented to the State thereunder, he used the following language :

"If there is no authority vested in you or any of the officers of the State to revest the United States with the legal title to the unearned lands, I urge upon you the propriety of obtaining authority from the general assembly, as early as possible, in order that such lands may be restored to the public domain.

Unless some early action is taken, looking to that end, it would become the duty of this Department to recommend a resort to legal proceedings for the restoration of such lands to the general government."

As has already been stated, the amount of land patented by the United States to the State for the benefit of the Sioux City Company was 407,910.21 acres, all of which was by the State certified to the Sioux City Company, except 85,457.40 acres which the State withheld. Deducting from the last named amount the 26,017.33 acres, certified by the governor back to the United States, and we have left 59,440.07 acres not certified or patented to the Sioux City Company, the beneficiary named in the patent to the State. Of the last named quantity, 37,747.39 acres were awarded to the Milwaukee Company under the supreme court decision (*supra*), but are nevertheless embraced in this application for suit. It here becomes necessary to inquire how many acres of the 322,452.81 acres certified to the Sioux City Company by the State were by said supreme court decision and the decree of the Circuit Court, made pursuant thereto, taken from said company and given to the Milwaukee Company by the partition made under said decree.

Within the common ten miles limits of the two roads were 50,539.73 acres patented to the State for the Sioux City Company. Of this quantity there had been—

	Acres.
Patented to the company.....	29, 280. 13
Withheld by the State.....	21, 259. 60

As the Milwaukee company was awarded one half of each of these quantities it received—

	Acres.
Of lands patented to Sioux City Co.....	14, 640. 06
Of lands <i>not</i> patented to Sioux City Co.....	10, 626. 80
Total.....	25, 266. 86

Within the common indemnity limits of the two roads were 42,188.93 acres, which had been patented to the State for the Sioux City Company. Of this there had been—

	Acres.
Patented to the Company.....	28, 777. 27
Withheld by the State.....	13, 411. 66

As the Milwaukee Company was awarded one half of each of these quantities, it received—

	Acres.
Of lands patented to Sioux City Co.....	14,348.63
Of lands <i>not</i> patented to the Sioux City Co.....	6,705.83
Total.....	21,094.46

Within the ten miles limits of the Milwaukee road, but within the indemnity limits of the Sioux City road, were 33,071.08 acres, which had been patented to the State for the Sioux City Company. Of this there had been—

	Acres.
Patented to the company.....	12, 658. 83
Withheld by the State.....	20, 412. 25
These added make.....	33, 071. 08

All which was awarded to the Milwaukee Company.

Within the ten miles limits of the Sioux City road, but within the indemnity limits of the Milwaukee road were 63,796.24 acres, which had been patented to the State for the Sioux City Company. Of this there had been—

	Acres.
Patented to the company.....	60, 184. 75
Withheld by the State.....	3, 611. 49
These added make.....	<u>63, 796. 24</u>

All of which were awarded to the Sioux City Company.

From the foregoing figures it appears that of lands which had been patented to the Sioux City Company there were awarded, under the decision of the supreme court, to the Milwaukee Company—

	Acres.
Lands in granted limits of Sioux City road.....	14,640.06
Lands in indemnity limits of Sioux City road }	14,388.63
}	12,658.83
	<u>27,047.46</u>
Total.....	<u>41,687.52</u>

The total award to the Milwaukee Company under the supreme court decision was 79,435.41 acres, 41,687.52 acres of which, as above shown, had been patented to the Sioux City Company. Deducting the last named amount from the total award, we have left as the amount of lands patented to the State for the Sioux City Company, but not by the State patented to the company—37,747.89 acres.

The quantity of land which the Sioux City Company, since the supreme court decision referred to, holds under patents from the State, may now be readily ascertained.

	Acres.
There were patented to the State for the benefit of the company, deducting 40 acres twice patented.....	407,870.21
Of this the State withheld	85,457.40
Amount patented to company	322,412.81
Of this awarded to Milwaukee Co., as above shown	41,687.52
Still held by Co. under patents from State	280,725.29

The next question suggested is—To what amount of land is the Sioux City Company entitled under the grant of Congress? Is it entitled to patents for any portion of the 85,457.40 acres withheld from it by the State? As I understand it, the applicants for suit are asking the United States to recover 55,297.21 acres in O'Brien county, which amount constitutes a part of the 85,457.40 acres above mentioned, as withheld by the State.

It is claimed generally in behalf of applicants that so far as the Sioux City Company is concerned, it has already received more lands than it has earned, and that if this were not true, the line of constructed road so deflects from the line of definite location that the company can not lawfully assert a right to patent for the lands in question; also that the company having failed to complete its entire line of road has no legal or equitable title to these lands as against the United States or the settlers.

The company claims that it has earned and is entitled under the grant to 6,400 acres per mile for the fifty-six and a quarter miles of road constructed, which would be 360,000 acres, and that after deducting from the lands patented for its benefit the amount decreed by the supreme court to the Milwaukee Company, there would remain a deficit of 31,525.20 acres, which it has earned but which it can not get out of all the lands patented to the State for its benefit.

As to the charge of deflection from the line of location, the Department, with the facts before it, and in the exercise of its discretion, passed upon the question years ago. By accepting the road, adjusting the grant and issuing patents on account thereof, it then determined that the line of constructed road was substantially upon the line of definite location. The question could not then be avoided. It belonged solely to the Secretary of the Interior to determine said question, which was one largely within the discretion of the Secretary. (16 Op., 457.)

I find in the case no sufficient reason for re-opening and further considering that question. As to the charge that the company failed to complete the entire line of road, and the claim that it therefore has no legal or equitable title to these lands, there can, I think, be no doubt that the company has earned and is entitled to its grant for the fifty miles of road constructed and certified in accordance with section four of the granting act. *Railroad v. Courtwright* (21 Wall., 310); Van

Wyck v. Knevals (106 U. S., 360). It was entitled under section four of the granting act to patents for every ten miles completed and properly certified, as soon as such section of ten miles was so completed and certified.

This brings me to the question, how much land has the company earned, and is it entitled under the grant to the lands in question, or any of them?

The records of the General Land Office show that there are within the common granted limits of the two roads 70,345.67 acres, one half of which as grant in place would go to each company. That would give to each company 35,172.83 acres within the common ten miles or granted limits.

It is strenuously urged, however, by both companies that they are each entitled to indemnity for the lands thus lost by grant to the other.

I am unable to conclude that such was the intention of Congress in making the grant. To say that it was would be to say in effect that in so far as the ten miles limits of the two grants overlap, the purpose of the granting act was to make what would amount to a double grant. Each company got a moiety of the lands in odd numbered sections within the common granted limits. Now should there be allowed to each company indemnity for the moiety lost by grant to the other, a quantity of land equivalent to all the odd and even numbered sections in said common granted limits would be passed under the granting act.

This, I think, could not be justified by any proper construction of the act, nor can I conceive it to have been intended by Congress.

The grant was of a moiety for each road within the common granted limits of both roads. This accords with the view expressed by the supreme court in the case of *St. Paul and Sioux City R. R. Co. v. Winona and St. Peter R. R. Co.* (112 U. S., 720.) Either this is true, or Congress by the same act twice granted the same lands. To say that it did, or intended to do, this, would be to say that it acted unreasonably, or without a proper understanding of what it was doing. Now, since indemnity is allowed only for lands granted and lost from the grant, and since in the common ten miles limits of those two roads only a moiety was granted, it follows that neither company has any legal claim for indemnity on account of the moiety granted to the other.

Again, it is argued in behalf of the Sioux City Company that it has earned and is entitled to its grant for the full fifty-six and a quarter miles of road constructed, that is, for the six and a quarter miles, as well as for the five sections of ten miles each.

After a careful consideration of the granting act, I can not concede the correctness of this proposition. Under the provisions of the fourth section of the act (which section has been quoted in full herein) it is clear that there is no authority for patenting lands under this grant, except upon certificate of the governor of the State to this Department, that ten consecutive miles of road have been "completed in a good sub-

stantial and workmanlike manner." The only exception to the manner of disposing of the lands, as above indicated, is that which may apply when the road is completed. The statute would seem to provide for the disposition of the lands for a fractional part of ten miles in that case, for it says that the whole of the lands granted shall then be patented.

This road has not been completed, but stops at Le Mars, about twenty-six miles short of the point (Sioux City) to which under the grant it should have been constructed. The reasons given for not completing the road, certainly furnish no reason for disposing of the public lands otherwise than in conformity with the law. The company stopped the building of its uncompleted road with a full knowledge of the requirements of the granting act as to the conditions on which it could get the lands. It is not therefore in position to complain because it can not get lands for the six and a quarter miles of road in question, and must accept the legal consequences of its own act. The company has heretofore practically conceded its want of title or valid claim to lands on account of the six and a quarter miles of road, for it has been to Congress asking for legislation which would give it the lands for said six and a quarter miles, and it opposed a bill which proposed to refer the questions relative to the status of said lands to the courts for judicial determination. See report No. 4, Senate Committee on Public Lands, 49th Congress, 1st session; copy in the record.

From the foregoing, the following conclusions result as to the grant for the benefit of the Sioux City Company. A full grant to it for the five sections of ten miles each, or fifty miles of road in a direct line, would be 320,000 acres. Deducting from this the one half of the land in the common granted limits, granted for the benefit of the Milwaukee Company, *viz.*, 35,172.83 acres, and there remain as enuring to the Sioux City Company under the grant at the most 234,827.17 acres. It has already been shown that said company now holds by patent under the grant 280,725.29 acres.

The most that it can be said to be yet entitled to is, 284,827.17 acres, less 280,725.29 acres, or 4,101.88 acres to be gotten out of the 85,457.40 acres withheld by the State. But of this 85,457.40 acres the State has reconveyed to the United States 26,017.33 acres, and the supreme court has awarded to the Milwaukee Company 37,747.89 acres. After deducting these quantities there remain in the State by a patent from the United States 21,692.18 acres, from which to get the 4,101.88 acres, which appear to be still due the company as earned lands under the grant. The difference between these two quantities is 17,590.30 acres, which amount of land the State holds by patent for the company, to which the company is not entitled, and for the recovery of which, in my judgment, suit should be brought.

Thus much with reference to the application in so far as it affects the Sioux City Company. The next inquiry is with reference to the Milwaukee Company, and its claims and holdings.

Said company having failed to accept the grant made as above mentioned, the State by act of its legislature, approved February 27, 1878, again resumed the grant and conferred the same upon the Chicago, Milwaukee and St. Paul Railway Company. This company accepted the grant and completed the road from Algona westward to point of intersection with the Sioux City road, at Sheldon, in O'Brien county. November 30, 1878, the governor of Iowa certified to the completion of the road from Algona in a westerly direction to the town of Sheldon, in the county of O'Brien, which town is on the line of the Sioux City road. He, at the same time, certified that the railroad thus constructed "is part 'of a railroad from a point at or near the foot of Main street, South McGregor,' in the State of Iowa, 'in a westerly direction by the most practicable route, on or near the forty-third parallel of north latitude,' to a point of intersection with a 'road running from Sioux City to the Minnesota State line, in the county of O'Brien, in said State,' as contemplated in said act of Congress, approved May 12, 1864." He further certified "that the whole of said last mentioned railroad is now completed and in running order."

The question was then raised as to whether the road had been constructed on the line of definite location, and whether, if it had not been so constructed, the grant should be adjusted on the line of definite location, or on the line of constructed road. The question as then presented seems to have had reference particularly to that portion of the road in Clay and O'Brien counties, the line of which was located in 1869, notwithstanding there had been what purported to be a location in 1864. The question was raised not because of the new location, but because there appeared to be some deviation of the line of road as constructed from the line of definite location by the maps filed in 1869.

The question thus presented was by this Department submitted to the Attorney General for his opinion. That officer, under date of February 2, 1880 (16 Op., 457), held that in contemplation of the statute the road was to be constructed upon the line of definite location, and therefore whatever adjustment of the grant is made must be made according to the line of definite location of the road; that whether the road has been constructed on the line of definite location is a matter for the Interior Department to determine.

Concurring in this opinion, my predecessor, Secretary Schurz, by his decision of April 9, 1880 (2 O. L. L., 793), held that in view of all the circumstances, the identity of the road was not destroyed by the deviations in construction from the located line, and that the State was entitled to patents for the granted lands. In other words, his decision was that the construction was in substantial compliance with the law, and that the State was entitled to patents for the granted lands. The entire length of road from McGregor to Sheldon is about two hundred and sixty-eight miles. Deducting from this, forty-three miles, the length of that portion of the road between McGregor and Calmar, on

account of which there was a waiver of the benefits conferred by the grant, there remained two hundred and twenty-five miles of road conceded to be land grant road, and on account of which lands were earned and the grant became effective, provided it be held that the law was complied with in the matters of location and construction.

A full grant for 225 miles would be 1,440,000 acres; but it appears that not nearly that amount of land was found available—in fact that the company did not get more than one-fourth the quantity named.

There can, therefore, be no question here relative to excess in the case of this company, as there has been shown in the case of the Sioux City Company.

So far as the application under consideration is concerned, it has special reference to such of the 85,457.40 acres, patented to the State for the benefit of the Sioux City company, and by the State withheld from the company, as are within the conflicting limits of the two grants in O'Brien county, and which have, under the decision of the supreme court (117 U. S., 406), been awarded to the Milwaukee Company.

It embraces none of the 26,017.33, which are also a part of said 85,457.40 acres, and which have been by the governor reconveyed to the United States.

The claim of counsel for the applicants is that suit should be brought in the name of the United States to recover the legal title to the lands in said conflicting limits in O'Brien county, held or claimed by the Milwaukee Company, because:—

1. Its line of constructed road deflects from both lines of 1864 and 1869.

2. It unlawfully abandoned the line of 1864, and without authority made a new location in 1869, on which it could not earn any lands.

3. It failed and refused to make its entire line as required by law, on the location of 1864, thence to Sheldon.

4. It has forfeited whatever right it may have had to the lands in controversy by the failure to construct and maintain as a land grant road, that portion of the line from McGregor to Calmar.

The foregoing cover substantially the reasons assigned by counsel for applicants, why a judicial forfeiture should be declared.

As to the first proposition, *viz*: that the lands should be forfeited, because of deflection from the line of location, it seems sufficient to say that, as has been indicated, the whole matter, with reference to deflection, was before this Department and was passed upon by my predecessor, Secretary Schurz, in April, 1880 (2 O. L. L., 793).

He took the opinion of the Attorney General (16 Op., 457), who said that slight deviations, "if made for the purpose of avoiding engineering obstacles which could not otherwise be avoided without exaggerated expense, or to remedy defects in the original location—that such deflections would not destroy the identity of the road constructed with the road of definite location"; also that "the question as to whether

the road constructed is or is not the road as definitely located, is a question for the Interior Department to determine and one which must largely be within the discretion of the Secretary."

Concurring in this view, the Secretary decided (2 C. L. L., 793), that the road had been constructed substantially on the line of definite location. All the facts now here were then before the Secretary, and, as his decision indicates, were by him fully understood and considered. There is no evidence of fraud or mistake.

I must therefore regard the question as *res judicata*, and must decline to reopen the same.

The second charge is, that the company unlawfully abandoned the line of 1864, and without authority made a new location in 1869, on which it could not earn any lands. This charge is made because, notwithstanding a map was filed in 1864 showing the line to a point near the center of O'Brien county, a new and different location was made in 1869, westward from the east line of Clay county, upon which it is claimed by the company the road was built. The claim of applicants for suit is that there was no authority for this new location; that consequently the road built thereon was constructed in accordance with the law, and no lands were earned on account of said construction.

I do not think, under the circumstances, that this objection is well founded. At the date of the location in 1864, the line of the Sioux City road, with which this road was to make intersection in O'Brien county, had not been located. Hence, it was then impossible to fix absolutely and definitely the line of the Milwaukee road through said counties to the point of junction, so as to conform to the act of Congress.

The line of 1864, in said counties, must therefore be regarded as a preliminary one, open and indefinite until the line of the Sioux City road should be established, with which it was, under the requirements of the statute, to make a junction in O'Brien county. This seems to have been the view of the land department when the location of 1869 was made, for it authorized, if it did not direct, that location.

Under date of May 13, 1868, Commissioner Wilson, in a letter to the governor of Iowa, said that, "in view of adjusting the grants respectively, it is desirable to have the true point of intersection in O'Brien county in accordance with the statute." In the same letter he requested that at an early day a map, properly authenticated, showing the true location of the line through Clay and O'Brien counties, to the point of intersection with the Sioux City road, be filed.

In October, 1868, the Commissioner addressed a letter to D. C. Shephard, civil engineer in charge of the relocation, calling his attention to the requirement of the act of 1864 relative to intersection with the Sioux City road in O'Brien county, and furnishing him a diagram of the located line to the east line of Clay county. On November 3, 1868, in reply to a request from Mr. Shephard, for further instructions, and to a suggestion that the further survey of the line be delayed till the follow-

ing spring, the Commissioner again wrote him, calling attention to the requirements of the granting act as to the point of intersection, and declining to consent to a delay of the survey until spring.

When the controversy between the two railroads was before the courts, the exact point here presented was in issue, and Judge Love held that the location of 1869 was in accordance with the law. When the case came before the supreme court, the decision below was modified in some particulars, but as to this point it was left undisturbed.

As the line of the Sioux City road only crossed the northwest corner of O'Brien county, and then ran in a southerly direction through the adjoining county on the west, the location of 1869 was clearly a necessity in order to make the junction of the two roads in O'Brien county, as required by the statute, and I can see no good reason for the conclusion that it was not made in accordance with law.

The third objection is that the company failed and refused to make its entire line as required by law on the location of 1864, thence to Sheldon. This objection has been practically disposed of in the consideration of the preceding propositions, and need not here be further discussed, except to say that had the company at any time after 1864 made a location from the terminus of the line of 1864 to the point of junction at Sheldon, the argument as presented by counsel would have been just as applicable as it is to the present condition of affairs, and would have amounted to an objection to any claim of title to the lands by the company. Such location could not have been made in 1864, for the reason that it was not then known, nor could it be, that Sheldon would be a point of junction.

The last proposition to be considered is, that the company has forfeited whatever right it may have had to the lands in controversy by the failure to construct and maintain as a land grant road that portion of the line between McGregor and Calmar.

It has already been stated that the State of Iowa, by act of its legislature, approved March 31, 1868, required that the McGregor Western Company, for itself and its successors and assigns, should release and waive all claim to any lands on account of the road then constructed, which was the road from McGregor to Calmar, a distance of about forty-three miles. The claim is, that because of this waiver, that portion of the Milwaukee road between McGregor and Calmar is not a land grant road; that therefore a land grant road has not been constructed and maintained from McGregor to a point of intersection with the Sioux City road in O'Brien county, as required by the granting act, and consequently the company is not entitled to the lands in question.

The proposition that this section of forty-three miles of road is not land grant road finds support in an opinion of the Attorney General, rendered in 1871, to that effect (13 Op., 445), the question having been referred to that officer by the Secretary of War, on the refusal of the

Milwaukee company to make an abatement for the transportation over the section of road mentioned of certain quartermaster's stores.

I am not without doubt as to the correctness of said holding by the Attorney General, but in no view of the question raised do I see that it affects the lands in dispute in O'Brien county. Those lands are claimed by the company on account of a portion of its road which it is not denied was constructed and is maintained as a land grant road with strict observance of the obligations relative to transportation. Having determined that the portion of the road in O'Brien county was constructed in compliance with the law, I must conclude, leaving out of view the forty-three miles of road between McGregor and Calmar, that the lands in question, in so far as they are now claimed by the Milwaukee company, have been earned by it. They have been awarded to it under the decision of the supreme court (117 U. S., 406), and most of them have, under the decree of the court, been patented to the company by the State.

If, as was thought by the Attorney General, the forty-three miles at the east end of the line is not land grant road, the fact remains that the remaining two hundred and twenty-five miles of the road was constructed and is maintained as a land grant road, and it is on account of the last mentioned portion of the road that those lands are claimed. The case would then be that the company had failed to complete and operate as land grant road the entire line of road from McGregor to Sheldon, the point of junction with the Sioux City road.

In other words, it had only built as land grant road two hundred and twenty-five miles on a total line of two hundred and sixty-eight miles. In this view it is in the same position as the Sioux City company, which built its road only to Le Mars, whereas the full line of grant was to Sioux City.

It has already been held herein that, under the supreme court decision in *Railroad v. Courtwright* (21 Wall., 310), and *Van Wyck v. Knevals* (106 U. S., 360), said company has earned and is entitled to its grant for the road constructed and certified in accordance with the terms of the granting act.

For the same reasons the grant must be regarded as earned along that portion of the Milwaukee road, constructed, certified and operated as a land grant road. The company is therefore entitled to the lands in question claimed by it and awarded to it under the decision of the supreme court (*supra*).

It may here be remarked that counsel claims that the patents issued by the State to the Milwaukee Company were without authority, and are void because they had been patented to the State for the Sioux City Company, and not for the Milwaukee company. On this it is sufficient to say that the conclusion of the supreme court was that the patents to the State named the wrong beneficiary as to these lands, and the court corrected that error by declaring the Milwaukee Com-

pany the beneficiary and entitled to the lands in question, which the State held by patent for the Sioux City Company.

The mandate of the highest court in the country, followed by a decree of the circuit court made pursuant thereto, I take it, furnished to the governor ample authority for passing the evidence of title.

Finding, for the reasons herein given, that the Milwaukee Company has earned and is entitled to all the lands in O'Brien county, which have been decreed and partitioned to it under the decision of the supreme court (*supra*), I must decline to request the institution of suit for the recovery of title to any of said lands.

With reference to the Sioux City Company and its claims and rights, I have, for the reasons assigned in the first part of this paper, concluded to request that suit be instituted in the name of the United States with a view to having declared in the United States the title to 17,590.30 acres of land in odd numbered sections in O'Brien county, Iowa, claimed by the Sioux City Company, under the grant of 1864.

You will please complete the adjustment of the grant in accordance with the views herein expressed, and make demand in compliance with the requirement of section two of the act of March 3, 1887 (24 Stat., 556), upon the St. Paul and Sioux City Railroad Company, and upon the State of Iowa for the relinquishment and reconveyance to the United States of the 17,590.30 acres, above referred to, or such quantity as the completed adjustment, in accordance with the principles herein enunciated, may show to be wrongly held by the State under patents from the United States.

If relinquishment and reconveyance be made, you will return the case to this Department, with your report thereon, for further action; if there be neglect or failure to so reconvey within ninety days after demand as aforesaid, you will promptly report the fact to this Department and return the record, in order that the Attorney General may be requested to institute suit for the recovery of the lands in question.

SCHOOL LANDS—SETTLEMENT BEFORE SURVEY.

THOMAS E. WATSON. (ON REVIEW.)

An act reserving lands to a territory for the benefit of schools is not a grant, but a reservation in contemplation of a future grant, Congress retaining full control and powers of disposition over such lands until the contemplated grant shall take effect.

The Territorial authorities are not bound to make selection of indemnity in lieu of lands occupied by a settler prior to survey, but may await the action of the settler, and if he fails to prove up, or abandons the claim, the right of the Territory to have the land held in reservation becomes absolute.

Indemnity selection, however, may be made as soon as it is ascertained that any of the lands specifically reserved are covered by a settlement claim existing prior to survey; but by such selection the reservation of the basis is relinquished and the land restored to entry.

The decision of October 5, 1885, (5 L. D., 169) recalled and revoked.

Acting Secretary Muldrow to Commissioner Sparks, July 29, 1887.

I have before me an informal motion asking a review and revocation of departmental decision, dated October 5, 1885, in the case of Thomas E. Watson, involving the SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, E. $\frac{1}{2}$ of SW $\frac{1}{4}$, and NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of Sec. 16, T. 19 N., R. 4 E., Spokane Falls, Washington Territory. (5 L. D., 169.)

Reference to said decision shows it to have been a mere formal affirmation of your office decision, dated August 12, 1884, the material facts in the case being substantially as follows: The township plat was filed in the local office April 2, 1875. On the 6th of May, 1875, one Thomas M. May filed pre-emption declaratory statement No. 849 for the tracts above specified, alleging settlement December 6, 1871; and on the 17th of December, 1883, he refiled for the same tracts. December 19, 1883, Watson made homestead entry No. 3761 of these tracts, alleging settlement some time in 1879, when he claims to have purchased the improvements of May on said land.

Under date of July 24, 1884, the register reported the above facts in the case to your office and asked instructions in the matter of Watson's entry. The said decision of August 12, 1884, was a reply to the register's letter, and held the entry of Watson for cancellation, on the ground—

That under the law a party settling upon unsurveyed land which upon survey is found to be in a school section is the *only* person who can defeat the reservation for school purposes, his right not being transferable.

As already stated, the decision sought to be revoked affirmed that ruling. Thereupon Watson's entry was canceled on the records of your office January 16, 1886.

Watson, by his attorney, then, on the 21st of May following, filed in the local office a relinquishment of his claim and interest in said lands, accompanied by an application for the return of fees and commissions, and the same was duly transmitted to your office. On the 26th of the same month he filed another application—this one requesting a review and revocation of the departmental decision (*supra*), and requesting further that his application for the return of fees and commissions and his relinquishment aforesaid, be held in abeyance, pending a consideration of his last application. This was also duly transmitted to your office, and was forwarded to the Department along with the other papers in the case May 10, 1887. In the meantime, it appears that Division "M" of your office, not knowing anything about the subsequent application of Watson, took up his application for the return of fees and commissions, decided the same in his favor, and returned said fees and commissions to him.

Strictly speaking the present motion is out of time, and might be denied on that ground. This, however, is an *ex parte* case, and certain equities enter into its consideration, which are urged to be sufficient to

make it an exceptional one. The real question in the case, too, is one of considerable importance, one in which the government is interested largely, and appears not to have been considered before in the light in which it is now presented.

It is claimed that Watson's improvements are valuable and permanent, amounting to considerably over \$1,000 in value, that he is a man "in extreme old age," with no means aside from this land and his improvements aforesaid, and that the cancellation of his entry will work a great and irreparable injury to him.

It is urged by his attorney that his case comes within the ruling in the case of Christian P. Willingbeck (3 L. D., 383), the entry in which was sent to the Board of Equitable Adjudication for confirmation. But it is to be noted that the Willingbeck case is no longer authority in the Department, it having been overruled by the recent case of John Johansen (5 L. D., 408). The Johansen case also referred to the decision complained of here, as being the "right interpretation of the law." But it is to be observed that the Johansen case and this case arise under different statutes—the land in the Johansen case lies in Utah, and the land in this case lies in Washington Territory.

Your office suggests that there may be a material difference between the act relating to school lands in Washington Territory and the general acts relating to school lands in the other Territories of the United States, and therefore the Johansen case may be correct in principle, so far as it applies to the other Territories, and yet not applicable to a case involving settlement upon school lands in Washington Territory.

The act of March 2, 1853 (10 Stat., 172), establishing a territorial government for Washington Territory, provided:

That when the lands in said Territory shall be surveyed under the direction of the government of the United States, preparatory to bringing the same into market or otherwise disposing thereof, sections numbered sixteen and thirty-six in each township in said Territory shall be, and the same are hereby, reserved for the purpose of being applied to common schools in said Territory. And in all cases where said sections sixteen and thirty-six, or either or any of them, shall be occupied by actual settlers prior to survey thereof, the County Commissioners of the counties in which said sections so occupied as aforesaid are situated, be, and they are hereby, authorized to locate other lands to an equal amount in sections, or fractional sections, as the case may be, within their respective counties, in lieu of said sections so occupied as aforesaid.

The general indemnity act approved February 26, 1859 (11 Stat., 385), applicable to all the States and Territories, except Washington Territory, provides:

That where settlements with a view to pre-emption have been made before the survey of the lands in the field, which shall be found to have been made on sections sixteen and thirty-six, said sections shall be subject to the pre-emption claim of such settler; and if they, or either of

them, shall have been or shall be reserved or pledged for the use of schools or colleges in the State or Territory in which the lands lie, other lands of like quantity are hereby appropriated in lieu of such as may be patented by pre-emptors, etc.

This statute was incorporated in the Revised Statutes of 1874 as section 2275. The twentieth section of the organic act of Washington Territory, above quoted, was carried into the Revised Statutes as section 1947. And the respective sections of the organic acts of the other Territories relating to the reservation of sections sixteen and thirty-six in said Territories for school purposes were collected and carried into the Revised Statutes as section 1946, which provides that :

Sections numbered sixteen and thirty-six in each township of the Territory (naming them) shall be reserved for the purpose of being applied to schools in the several Territories herein named, and in the States and Territories hereafter to be erected out of the same.

While the act reserving the school sections in Washington Territory differs in phraseology from the general law relating to school lands in the other Territories, and provides for the manner and by whom other sections may be reserved in lieu of sections sixteen and thirty-six, where either of said sections may be occupied by actual settlers prior to survey, yet I think it is apparent that the main purpose and object of both acts is to protect the inchoate right of a settler who went upon the land prior to survey and is found in possession at the date of survey, and not for the benefit of a settler who went upon the land after survey with full knowledge of the fact that the settlement is made upon lands reserved to the Territory for school purposes.

The rights of a settler on school lands prior to survey are protected because his settlement is made without notice that the land settled upon and improved is within the specified sections, but a settler upon school lands after survey has full notice of the identical lands reserved, and there can be no reason or purpose in protecting such settlement against the reservation for school purposes.

However, in view of the facts now presented by the record, I am of the opinion that Watson's right to the tract in dispute is not controlled by the issues presented in your letter of May 10, 1887, but depends solely upon the ground that at the date of his homestead entry it was not in reservation, but was subject to entry under the general land laws.

The township plat, embracing the tract in controversy, was filed in the local office April 2, 1875. On May 6, 1875, one Thomas M. May filed declaratory statement for said tract, alleging settlement December 6, 1871, and refiled for the same December 17, 1883. September 2, 1880, the county commissioners made selection as per list No. 1 of another tract of land in lieu of the tract in controversy, upon the ground of May's settlement at and prior to the filing of the township plat.

December 19, 1883, Watson made homestead entry of the tract. January 21, 1884, May gave notice of his intention to make final proof, to which Watson filed objections. May failing to appear at the hearing ordered on the protest of Watson, he was declared in default and his filing was canceled August 12, 1884.

It appears also that on February 21, 1884, the selection made by the county commissioners as indemnity in lieu of the tract in controversy, with others included in list No. 1, was canceled, "for the want of proper basis, the same being made as indemnity for certain alleged deficiencies in school sections, covered by pre-emption declaratory statements, upon which no proof had been offered and which have expired by limitation of law."

From the foregoing, three uncontroverted facts appear, to wit: (1) That at the date of the filing of the township plat the tract in controversy was occupied by an actual settler, whose settlement existed prior to the survey of the township, and whose declaratory statement was filed within the time required by law. (2) That by reason of said settlement the county commissioners by virtue of authority conferred upon them by the act of March 2, 1853, selected and located other land in equal amount in lieu of the tract so occupied. (3) That subsequent to said selection of indemnity land and prior to the cancellation thereof, Watson made homestead entry of the indemnity basis. Hence, the question arises: Was the land entered by Watson open public land at the date of said entry, free from the reservation for school purposes?

The act reserving lands to a territory for the benefit of schools not being a grant, but simply a reservation in contemplation of a future grant, Congress retains full control and power of disposition over such lands, until the contemplated grant shall take effect. Hence, it has provided that under certain circumstances the reservation for the benefit of schools shall be transferred from the specific section reserved to other lands as indemnity therefor.

The territorial authorities are not bound to make selection of indemnity lands in lieu of lands within a sixteenth or thirty-sixth section, occupied by an actual settler prior to survey, but may await the subsequent action of the settler, and if he fails to prove up or abandons his claim, the right of the territory to have such lands held in reservation would attach immediately upon the extinguishment of the claim of such settler, and no right as against the territory can intervene by subsequent settlement, based upon the rights of a settler prior to survey, or the purchase of improvements thereof. This is the principle recognized in the case of Willingbeck (3 L. D., 383), and directly decided in the case of Johansen (5 L. D., 408).

Nor are they prohibited from making selection of equivalent land, as soon as it is determined that lands within the sections specifically reserved are occupied by an actual settler, or required to await until the

settler shall prove up his claim, but, on the contrary, they are by the very terms of the act expressly authorized to locate other lands "in all cases where said section sixteen and thirty-six, or either or any of them, shall be occupied by actual settlers prior to survey thereof." However, having by virtue of the authority conferred by said act, exercised the right of selection of equivalent lands in lieu of the lands within the sixteen or thirty-sixth sections, occupied by an actual settler prior to survey, the reservation by the act of selection is transferred from the basis to the indemnity, and by the same act the reservation of the basis is relinquished and the land restored to entry.

This selection, with others, was canceled by the Commissioner February 21, 1884, upon the ground that May failed to make proof of his claims within the time required by law. But the right of selection did not depend upon the subsequent action of May, but upon the ground that at the date of the survey he was an actual settler upon the land. In furtherance of his right of settlement, he filed his declaratory statement for said tract within the time required by law, and this filing was of record, uncanceled, at the date of selection. The selection was therefore a valid appropriation and reservation of the tract for the purposes contemplated by the act, and was so held in reservation and not subject to other disposal at the date of Watson's entry of the basis upon which such selection was made.

In the case of Agnes Earle (2 L. D., 626), an application to enter an indemnity selection pending such selection was rejected. The appellant claimed that the selection was improperly and illegally made and was without effect. But the Secretary held, "It is not here necessary to consider that question, for the selections became an appropriation and reservation of the tract, and so long as these continue the tracts are not subject to other disposal."

I am therefore of the opinion that the selection of indemnity lands in lieu of the tract in controversy, being authorized by the act, was a valid reservation of said tract for school purposes, and as the Territory could not hold both the basis and the indemnity in reservation at the same time and for the same purpose, the tract entered by Watson was at the date of his entry subject to said entry and free from the reservation for school purposes.

The decision of the Department of October 5, 1885, is recalled and the order of cancellation therein directed is hereby revoked. You will therefore re-instate Watson's entry, and also re-instate the selection made by the Territory September 12, 1880, as indemnity for the land in controversy, unless other rights have intervened since said order of cancellation of February 21, 1884. In that event, the Territory will be allowed to select equivalent land in lieu thereof.

RAILROAD GRANT—INDEMNITY WITHDRAWAL.

As obstructions in the way of *bona fide* settlement of the public domain should be removed as speedily as possible after the reasons which created them have ceased to exist, indemnity withdrawals should not be maintained beyond a period sufficient for the assertion of rights that may be properly claimed thereunder.

Secretary Lamar to the President, May 20, 1887.

It appears from the records of the General Land Office that a large number of land grant railroad companies have made indemnity selections to the full extent of their rights, under their respective grants, and that a number of others, while they have not selected the full quantity, have selected all the lands within the indemnity limits of such grants which are subject to selection. Those which have selected the full quantity, as shown by the records of this Department, are the Illinois Central, in the State of Illinois; the Mobile and Ohio River, in the State of Alabama; the Pensacola and Atlantic and the Pensacola and Georgia, in the State of Florida; the Cedar Rapids and the Missouri River and the Dubuque and Mississippi, in the State of Iowa; the Sioux City and St. Paul, in the State of Iowa; the Marquette, Houghton and Ontonagon, so far as that road has been constructed, and the Wisconsin Farm Mortgage, in the State of Wisconsin; the St. Paul and Sioux City and the Winona and St. Peter, in the State of Minnesota; the St. Paul, Minneapolis and Manitoba Main Line, in the State of Minnesota; the Missouri, Kansas and Texas, in the State of Kansas; the Northern Pacific, in Dakota; the Northern Pacific Main Line, in Washington Territory; and the Coos Bay Wagon Road, in the State of Oregon.

Those which have selected as far as there are lands subject to selection, are the Alabama and Chattanooga, the Alabama and Florida and the South and North Alabama, in the State of Alabama; the Mobile and Ohio River, and the Vicksburg and Meridian, in the State of Mississippi; the Florida and Alabama, and the Florida, Atlantic and Gulf Central, in the State of Florida; the Vicksburg, Shreveport and Texas, and the New Orleans and Pacific, in the State of Louisiana; the Burlington and Missouri River, the Chicago, Rock Island and Pacific, and the Chicago, Milwaukee and St. Paul, in the State of Iowa; the Grand Rapids and Indiana, the Jackson, Lansing and Saginaw, the Flint and Pere Marquette and the Chicago and Northwestern, in the State of Michigan; the Chicago and Northwestern and the Chicago, St. Paul and Omaha, in the State of Wisconsin; the Minnesota Central, the Southern Minnesota, the Hastings and Dakota, the Lake Superior and Mississippi, the Brainerd Branch of the St. Paul, Minneapolis and Manitoba, and the St. Vincent Extension, in the State of Minnesota; the St. Joseph and Denver City, in the State of Kansas; the Northern Pacific, in the State of Wisconsin; and the Northern Pacific, in the State of Minnesota.

The following table shows the date of withdrawal and the date of definite location, or time when the right of selection accrued, for these several roads.

State.	Name of Road.	Date of Withdrawal.	When right of selection accrued, or date of definite location.
Ills.	Illinois Central.		
Ala.	Mobile & Ohio River	Sept. 20, 1850	July 10, 1852
	Alabama & Chattanooga	June 19, 1856	Nov. 29, 1856
	Alabama & Florida	May 17, 1856	Sept. 18, 1856
	South & North Alabama	June 19, 1856	{ May 30, 1856 { July 26, 1871
Miss.	Mobile & Ohio River	Sept. 20, 1850	{ Oct. — 1851 { Nov. — 1851 { Feb. — 1853
	Vicksburg & Meridian	Aug. 9, 1856	Sept. 19, 1857
Fla.	Florida & Alabama	June 9, 1856	{ July 16, 1856 { Aug. 13, 1856 { May 6, 1857
	Fla., Atlantic & Gulf Central	May 23, 1856	Aug. 19, 1857
	Pensacola & Atlantic	May 23, 1856	May 10, 1858
	Pensacola & Georgia	May 23, 1856	Aug. 17, 1857
La.	Vicksburg, Shreveport & Texas	Oct. 22, 1856	Mch. 27, 1857
	New Orleans Pacific	Nov. 29, 1871	
		Mch. 27, 1873	
		Oct. 15, 1883	Mch. 19, 1883
Iowa.	Burlington & Missouri River	Oct. 20, 1856 (Odd Sec.)	Mch. 24 or April 7, 1857
		June 2, 1865 (Even Sec.)	June 2, 1864
	Chicago, Rock Island & Pacific	Oct. 20, 1856 (Odd Sec.)	Sept. 11, 1856
		June 7, 1865 (Even Sec.)	Jan. 11, 1870
	Cedar Rapids & Mo. River	Oct. 20, 1856 (Odd Sec.)	Oct. 31, 1856
		June 12, 1875 (Even Sec.)	Dec. 1, 1867
	Dubuque and Pacific		
	Chicago, Milwaukee & St. Paul	Sept. 12, 1864	Aug. 30, 1864
		Feb. 4, 1869	Jan. 27, 1869
			Sept. 2, 1869
Mich.	Sioux City & St. Paul	Aug. 26, 1867	July 17, 1867
	Grand Rapids & Indiana	June 13, 1856	Dec. 2, 1857
		Oct. 23, 1866	May 22, 1866
	Jackson, Lansing & Saginaw	Aug. 16, 1858	Oct. 23, 1858
	Flint and Pere Marquette	June 13, 1856	Aug. 18, 1857
	Chicago & Northwestern	June 16, 1865	Nov. 13, 1857
	Marquette, Houghton & Ontonagon	Ap'l 24, 1860	Jan. 14, 1859
		Ap'l 28, 1865	Jan. 14, 1859
Wis.	Chicago & Northwestern	Nov. 30, 1857	Nov. 30, 1857
		Nov. 30, 1857	Jan. 8, 1863
	Chicago, St. Paul, Minn. & Omaha	Feb. 28, 1866	Mch. 2, 1856
		Feb. 28, 1866	July 17, 1858
		June 12, 1856	Sept. 7, 1857
		Feb. 5, 1866	June 9, 1865
	Wisconsin Farm Mortgage.		
Minn.	Minnesota Central	Dec. 6, 1867	Oct. 5, 1867
	Southern Minnesota	Mch. 30, 1858	Feb. 20, 1858
		Aug. 23, 1866	Mch. 25, 1867
		Ap'l 26, 1867	May 8, 1871
		May 17, 1871	
	St. Paul and Sioux City	Mch. 21, 1858	Feb. 20, 1858
		Aug. 10, 1865	May 12, 1864
		Oct. 10, 1869	July 7, 1866
	Winona and St. Peter	Mch. 25, 1858	July 29, 1858
		Aug. 10, 1864	Aug. 3, 1864
		July 10, 1865	Mch. 3, 1865
		Aug. 15, 1867	Feb. 23, 1867
		Ap'l 24, 1869	Sept. 10, 1868
	Hastings and Dakota	July 13, 1866	June 26, 1867
		Ap'l 22, 1868	
	Lake Superior & Mississippi	Nov. 2, 1866	Oct. 12, 1866
	St. Paul, Minneapolis and Manitoba, Main Line.	Mch. 25, 1858	Dec. 4, 1857
		July 10, 1865	Mch. 3, 1865
		Aug. 14, 1868	Aug. 5, 1868
		Ap'l 12, 1869	May 10, 1869
	Brainerd Branch	Mch. 25, 1858	Dec. 4, 1857
		July 10, 1865	Mch. 3, 1865
	St. Vincent Extension	Feb. 6, 1872	Dec. 19, 1871
Kans.	Missouri, Kansas & Texas	Mch. 19, 1867	Dec. 3, 1866
	St. Joseph and Denver City	Ap'l 8, 1870	Mch. 23, 1870
Wis.	Northern Pacific	June 20, 1883	July 6, 1883
		Oct. 20, 1883	" " "
		Jan. 5, 1893	" " "

State.	Name of Road.	Date of Withdrawal.	When right of selection accrued, or date of definite location.
Minn	Northern Pacific	Dec. 28, 1871.....	Nov. 21, 1871
		Jan. 8, 1883.....	
		June 18, 1883.....	July 6, 1882
		Oct. 11, 1888.....	
Dak	Northern Pacific	Mch. 30, 1872.....	June 11, 1873
		" " ".....	May 23, 1880
		" " ".....	Nov. 29, 1880
Wash.....	Northern Pacific, Main Line,		
	Kalamo to Tenino.....	Jan. 21, 1874.....	Sept. 18, 1873
	Tenino to Tacoma.....	Nov. 12, 1874.....	May 14, 1874
	Wallula to Spokane Falls.....	Nov. 12, 1880.....	Oct. 4, 1880
	Spokane Falls to Pend D'Oreille.....	June 9, 1884.....	Aug. 30, 1881
	Pend D'Oreille to Montana.....	Sept. 1, 1884.....	Dec. 12, 1882
	Yakima to Ainsworth.....	Jan. 6, 1885.....	Oct. 29, 1883
	Ainsworth to Swank Creek.....	Jan. 6, 1885.....	May 24, 1884
	Tacoma, East 25 miles.....	Nov. 28, 1884.....	Mch. 26, 1884
	25 to 50 miles east.....	Nov. 28, 1884.....	Sept. 3, 1884

These withdrawals, as shown by this table, have been running and continued in operation for more than two years in the case of the Ainsworth and Swank Creek Railroad, to nearly thirty-seven years in that of the Mobile and Ohio. Under the rulings of this Department, no settler can acquire any right under any of the general land laws to any part of the public domain, so long as the same remains withdrawn by order of the President, or by his authority. There seems now to be no valid reason why these orders of withdrawal should not be revoked. Obstructions in the way of *bona fide* settlement of the public domain should be removed as speedily as possible after the reasons which created them have ceased to exist. Believing that these railroad companies have had ample time to assert any rights they may have in regard to indemnity to which they may be entitled, and that no unnecessary hardship can now result to them by restoring these lands to the public domain for the benefit of settlers, it is my purpose, if it meets your approval to take all necessary steps looking to the accomplishment of that object.

I suggest, in order to prevent action being taken which may result in hardship in any case, that thirty days notice be given, by publication in some leading newspaper in the locality of these respective roads, notifying their managers of the purpose of this Department, in order that they may show cause, if they can, by a certain day to be fixed in such notice, why the proposition herein submitted should not be carried into execution.

Steps will be taken in reference to the indemnity lands of the other land grant railroads with a view to the restoration of these lands to settlement (allowing a given and reasonable time to make their selections), as soon as the Department is in possession of such information as will enable it to act intelligently in making allowances to said companies of indemnity lands in lieu of those lost in place.

Hitherto, as a rule, the Secretary of the Interior has acted by virtue of his general authority, even in those cases in which the statute directs

the performance of the duty by the President, in terms; the courts having held that in such cases the act would be presumed to have been done under the President's direction. But in view of the importance of the action herein proposed to be taken in the exercise of authority granted to you, I submit the matter for your consideration.

Approved,

GROVER CLEVELAND,
President.

Rule returnable June 27, 1887, entered on certain railroad companies to show cause why the lands heretofore withdrawn for indemnity purposes under the respective grants to said companies should not be restored to the public domain.

DEPARTMENT OF THE INTERIOR,
Washington, May 23, 1887.

It appearing from the records of this Department that orders withdrawing lands from settlement under the public land laws within the indemnity limits of the following list of land grant railroads are still existing, and that these several roads have either made selection of all the lands to which they are respectively entitled, or have selected all liable to such selection in lieu of those lost in place within the limits of their respective grants, viz:

Name of road, and State or Territory.	Date of withdrawal
STATE OF ALABAMA.	
South & North Alabama	June 19, 1880
Mobile & Ohio River	*Sept. 20, 1880
Alabama & Florida	May 17, 1886
Alabama & Chattanooga	June 19, 1886
STATE OF FLORIDA.	
Florida, Atlantic & Gulf Central	May 23, 1886
Pensacola & Atlantic	May 23, 1886
Pensacola & Georgia	May 23, 1886
Florida & Alabama	June 9, 1886
STATE OF IOWA.	
Burlington & Missouri River	†Oct. 20, 1856
Chicago, Rock Island & Pacific	June 2, 1865
Chicago, Rock Island & Pacific	†Oct. 20, 1856
Cedar Rapids & Missouri River	June 7, 1865
Dubuque & Pacific	†Oct. 20, 1856
Chicago, Milwaukee & St. Paul	June 12, 1875
Sioux City & St. Paul	Sept. 12, 1864
	Feb. 4, 1869
	Aug. 26, 1867
STATE OF ILLINOIS.	
Illinois Central	
STATE OF KANSAS.	
Missouri, Kansas & Texas	Mar. 19, 1867
St. Joseph & Denver City	Apr. 8, 1870

* The Mobile & Ohio, and Illinois Central Companies should not have been included within this rule or the letter of May 20th, as the order of withdrawal made for the benefit of said companies had been revoked, and said companies were included by mistake.

† Date of withdrawal of odd sections.

‡ Date of withdrawal of even sections.

Name of road, and State or Territory.	Date of withdrawal.
STATE OF LOUISIANA.	
Vicksburg, Shreveport & Texas	Oct. 22, 1856
New Orleans Pacific	Nov. 29, 1871
	Mar. 27, 1873
	Oct. 15, 1883
STATE OF MICHIGAN.	
Grand Rapids & Indiana	June 12, 1856
Flint & Pere Marquette	Oct. 22, 1866
Jackson, Lansing & Saginaw	June 13, 1856
Marquette, Houghton & Ontonagon	Aug. 16, 1858
Chicago & Northwestern	Apr. 24, 1860
	Apr. 28, 1865
	June 16, 1865
STATE OF MINNESOTA.	
Southern Minnesota	Mar. 30, 1858
	Aug. 23, 1866
	Apr. 26, 1867
	May 17, 1871
St. Paul & Sioux City	Mar. 21, 1858
	Aug. 10, 1865
	Oct. 10, 1869
Winona & St. Peter	Mar. 25, 1858
	Aug. 10, 1864
	July 10, 1865
	Aug. 15, 1867
	Apr. 24, 1869
St. Paul, Minneapolis & Manitoba, Main Line	Mar. 25, 1858
	July 10, 1865
	Aug. 14, 1868
	Apr. 12, 1869
Brainard Branch	Mar. 25, 1858
	July 10, 1865
Hastings & Dakota	July 12, 1866
	Apr. 22, 1868
Lake Superior & Mississippi	Nov. 2, 1866
Minnesota Central	Dec. 6, 1867
	Dec. 26, 1871
Northern Pacific	Jan. 5, 1883
	June 18, 1883
	Oct. 11, 1883
St. Vincent Extension	Feb. 6, 1872
STATE OF MISSISSIPPI.	
Mobile & Ohio River	Sept. 20, 1850
Vicksburg & Meridian	Aug. 9, 1856
STATE OF WISCONSIN.	
Chicago & Northwestern	Nov. 30, 1857
	Nov. 30, 1857
	Feb. 28, 1866
Chicago, St. Paul, Minneapolis & Omaha	Feb. 28, 1866
	June 12, 1856
	Feb. 5, 1866
Wisconsin Farm Mortgage	
Northern Pacific	June 20, 1883
	Oct. 24, 1883
	Jan. 5, 1883
DAKOTA TERRITORY.	
Northern Pacific	Mar. 30, 1872
	Mar. 30, 1872
	Mar. 30, 1872
Northern Pacific, Main Line:	
Kalama to Tenino	Jan. 21, 1874
Tenino to Tacoma	Nov. 12, 1874
Wallula to Spokane Falls	Nov. 13, 1880
Spokane Falls to Pend d'Oreille	June 9, 1884
Pend d'Oreille to Montana	S. pt. 1, 1884
Yakima to Ainsworth	Jan. 6, 1885
Ainsworth to Swan Creek	Jan. 6, 1885
Tacoma, East 25 miles	Nov. 28, 1884
25 to 50 miles east	Nov. 28, 1884

And it now appearing from said records that there is no sufficient reason for longer continuing in force the said several orders of withdrawal, now, rule is hereby entered on the said several land grant railroad companies to show cause on or before the 27th day of June, 1887, why the said several orders of withdrawal from settlement of the lands within the indemnity limits of their several roads should not be revoked, and the lands therein embraced restored to settlement.

Returnable before the Secretary of the Interior on the 27th day of June, 1887, at 10 o'clock, a. m.

L. Q. C. LAMAR,
Secretary.

Rule returnable June 28, 1887, entered on certain railroad companies to show cause why the lands heretofore withdrawn for indemnity purposes under the grants to said companies should not be restored to the public domain.

DEPARTMENT OF THE INTERIOR,
Washington, May 23, 1887.

It appearing from the records of this Department that orders withdrawing lands from settlement under the public land laws within the indemnity limits of the following list of land grant railroads are still existing, and that these several roads have not informed this Department to what extent they are entitled to lands within such indemnity limits by reason of those lost in place of their respective grants, and that ample time has been given them to assert their rights in this behalf, namely:

Name of road, and State or Territory.	Date of withdrawal.
STATE OF ALABAMA.	
Coosa & Tennessee	June 19, 1856
Selma, Rome & Dalton	June 19, 1856
Mobile & Girard	June 19, 1856
STATE OF ARKANSAS.	
St. Louis, Iron Mountain & Southern	
STATE OF CALIFORNIA.	
California & Oregon	{ Oct. 29, 1867 Sept. 6, 1871 Feb. 18, 1885 May —, 1887 May 10, 1871
Southern Pacific, Main Line	
Branch Line	
STATE OF FLORIDA.	
Florida Railway & Navigation	Sept. 6, 1856
STATE OF MICHIGAN.	
Marquette, Houghton & Ontonagon	Apr. 24, 1860
STATE OF MISSISSIPPI.	
Gulf & Ship Island	Aug. 9, 1856
STATE OF MISSOURI.	
St. Louis, Iron Mountain and Southern	

Name of road, and State and Territory.	Date of withdrawal.
STATE OF OREGON.	
Northern Pacific	Aug. 13, 1870
	Jan. 8, 1885
	Jan. 31, 1870
	Apr. 7, 1870
	July 12, 1870
	Mar. 31, 1871
	July 5, 1883
Oregon & California	July 5, 1883
	July 5, 1883
	Sept. 3, 1883
	Oct. 27, 1883
	Oct. 27, 1883
	Dec. 19, 1884
Oregon Central Wagon Road	May 5, 1871
Dalles Military Wagon Road	June 25, 1879
	Dec. 14, 1871
ARIZONA TERRITORY.	
Atlantic & Pacific	May 17, 1872
IDAHO TERRITORY.	
Northern Pacific	Apr. 15, 1872
MONTANA TERRITORY.	
	Sept. 29, 1883
	Oct. 8, 1883
	June 8, 1883
	June 9, 1883
	Nov. 10, 1883
Northern Pacific	June 8, 1883
	June 9, 1883
	July 3, 1883
	Sept. 25, 1884
	Feb. 20, 1885
NEW MEXICO TERRITORY.	
Atlantic & Pacific	May 8, 1872
WASHINGTON TERRITORY.	
	Jan. 21, 1874
	Nov. 12, 1874
	Nov. 13, 1880
	June 9, 1884
Northern Pacific	Sept. 1, 1884
	Jan. 6, 1885
	Jan. 6, 1885
	Nov. 28, 1884
	Nov. 28, 1884

And it now appearing that no sufficient reason exists for longer continuing in force said several orders of withdrawal, or that a time certain should be fixed within which the rights of these several roads should be asserted and that lands to which said railroad companies are not entitled in said indemnity limits should be restored to settlement, now, rule is hereby entered on said several railroad companies to show cause on or before the 28th day of June, 1887, why said several orders of withdrawal should not be revoked, or such other action taken as shall speedily restore such lands to the public domain for settlement.

Returnable before the Secretary of the Interior on the 28th day of June, 1887, at 10 o'clock, a. m.

L. Q. C. LAMAR

Secretary.

NOTE.—Under the foregoing rules to show cause, etc., the following companies filed answer: Alabama and Chattahoochee R. R. Co., Atlantic and Pacific R. R. Co., California and Oregon Land Company, California and Oregon R. R. Co., consolidated with the Central Pacific R. R. Co., Chicago, St. Paul, Minneapolis and Omaha Ry. Co., Dalles Military Road Co., Flint and Pere Marquette R. R. Co., Florida Railway and Navigation Co., Gulf and Ship Island R. R. Co., Hastings and Dakota Ry. Co., Marquette, Houghton and Ontonagon R. R. Co., Missouri, Kansas and Texas Ry. Co., Mobile and Girard Railroad Co., New Orleans, Baton Rouge and Vicksburg R. R. Co., New Orleans Pacific R. R. Co., Northern Pacific R. R. Co., Oregon and California R. R. Co., Oregon Central Wagon Road Co., Pensacola and Atlantic R. R. Co., St. Louis, Iron Mountain, and Southern Ry. Co., St. Paul and Duluth R. R. Co., St. Paul and Northern Pacific Ry. Co., St. Paul, Minneapolis and Manitoba Ry. Co., St. Paul and Sioux City R. R. Co., Sioux City and St. Paul R. R. Co., Southern Pacific R. R. Co., Tennessee and Coosa R. R. Co., Vicksburg and Meridian R. R. Co., Vicksburg, Shreveport and Pacific R. R. Co., Winona and St. Peter R. R. Co., Wisconsin Central R. R. Co., Wisconsin Farm Mortgage Co.

RAILROAD GRANT—INDEMNITY WITHDRAWAL—RULE OF MAY 23, 1867.

ATLANTIC AND PACIFIC R. R. CO.

The act of July 27, 1866, is both a legislative grant and a contract, but as the grant was not one of quantity, and the right to select indemnity was confined within certain limits, unprotected by legislative withdrawal, there is no violation of the contract, on the part of the government, though the company may not get the full amount of the sections within the primary limits, and fails to make up the deficiency within the secondary limits, such contingency being plainly contemplated by the granting act, and the company having made its contract subject thereto.

Waiving the question as to whether said act took from the Secretary all authority to withdraw the lands within the indemnity limits from settlement, it is manifest that said act gave no special authority or direction to the Executive to withdraw said lands; that such withdrawal, when made, was done by virtue of the general authority over such matters possessed by the Secretary of the Interior, and in the exercise of his discretion, and by the same authority may be revoked; and that, were the withdrawal vacated no law would be violated or contract broken.

Though the act directed the necessary survey, the Department has no authority to order the same except on due appropriation of money by Congress to cover the cost thereof, and the grant was made and accepted subject to such condition. There is no law that authorizes the Land Department to accept or use a deposit advanced by the company to cover the cost of survey.

The indemnity withdrawal made for the benefit of the company is revoked on the ground that such action is required by a sound public policy with respect to settlement rights on the public domain, and is not in violation of either law or equity. The company having failed to keep its contract in the matter of commencing and completing the construction of its road should not be heard to object to such order of revocation.

Secretary Lamar to Commissioner Sparks, August 13, 1887.

I have considered the showing made by the Atlantic and Pacific Railroad Company, in response to the rule of May 23, 1887, to show cause why the withdrawal of the lands within its indemnity limits should not be revoked, and said lands thrown open to settlement.

The answer of the company covers only that portion of said road west of the State of Missouri, it being asserted that the portion constructed within said State has by foreclosure sale passed into other hands.

The answer asserts that from its junction at Isleta, New Mexico with the Atchison, Topeka and Santa Fé Railroad, five hundred and sixty-five miles of road westward, to the Arizona line, have been constructed, and accepted by the President, in accordance with the provisions of the granting act; whereby the company earned the lands opposite said road, and also the right to select indemnity for such as were, at the date of definite location, "granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of;" that opportunity for selection of either place or indemnity lands was not afforded by reason of the failure of the government to make survey of the lands in question; that to remedy this situation the company offered to deposit the necessary funds to pay for making the surveys; but such offer was declined by your office; that afterwards, on September 3, 1885, the company presented to the register and receiver of each land district wherein any such lands were situated, a "broad application to select all the odd sections, both surveyed and unsurveyed, within its indemnity belt," which application was accompanied by a statement showing that, if the company were given every odd section, there would yet be a deficiency of over one million of acres on its constructed line; and at the same time offer was made to pay all fees and cost of surveys, etc. This application was also denied.

The company further alleges that, during June, 1887, selections were made of all surveyed indemnity land opposite its constructed line, proper bases being shown for said selections, and the same were accepted by the local officers; that at the same time application was made for all the unsurveyed indemnity lands, attempting to give a proximate description thereof by protracting section, town, and range lines on the maps of withdrawal; specifying also the basis for the indemnity claim. These applications were also rejected.

It is also asserted that the area of the grant opposite the constructed road in New Mexico and Arizona is 14,473,766 acres; that the loss in said area, by private grants and reservations, is 3,310,886 acres, the losses by pre-emption, homestead claims, or minerals, not being ascertainable even by approximation; to meet which loss it is asserted there is only available some two millions of acres within the indemnity belt.

On this asserted state of facts it is insisted that the company is entitled to indemnity lands; that there has been no want of proper dili-

gence on its part in the assertion of its claim thereto; that the delay and difficulty has arisen entirely from the failure of the United States to make the necessary surveys and adjust private land claims within said limits, and that a revocation of the indemnity withdrawals under these circumstances would be a gross violation of the contract between the government and the road.

It is not necessary at present to inquire into the accuracy of the matters of fact stated in said answer. As to the rights of the company under the law, conceding the alleged facts to be true, it is proper I should express an opinion and make known to you my judgment.

It is not to be denied that the act of July 27, 1866, (14 Stat., 292), incorporating the Atlantic and Pacific Railroad Company, and granting to it certain lands, is both a legislative grant and a contract. This being so, and said contract being now set up by the company as a bar to the right of the executive to revoke existing indemnity withdrawals, it is proper to examine said act, and see exactly what the contract was.

The third section of the act grants to the company ten odd numbered sections of land, on each side of the line of its road passing through the States, and twenty sections, where the road passes through the Territories; and also provides that indemnity for the lands lost within the granted limits by reason of the causes stated in said act may be selected from the odd-numbered sections within the further limits of ten miles. Section 6 provides—

That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd-numbered sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed except by said company as provided in this act;

but the provisions of the homestead and pre-emption laws are extended "to all other lands on the line of said road, when surveyed excepting those hereby granted to said company."

Now here was a grant to the free, alternate odd-numbered sections to be found within twenty miles on each side of the road in the States, and within forty miles in the Territories; with the right to take the free odd-numbered sections found within a further limit of ten miles, as indemnity for lands lost in the granted limits. The order was for the survey of the lands "for forty miles in width" or only to the extent of the granted limits in the Territories, and ten miles beyond the granted and indemnity limits in the States.

While surveys were to be made to this extent, the withdrawal of lands "after the general route shall be fixed" "from sale or entry, or pre-emption before or after survey" only related to "the odd sections hereby granted." This plain statement shows that the contract of the government was to give the stated quantity of land if it could be found free within the granted limits: and for the purpose of securing as far

as possible the full fruition of the grant to the company, the act, creating alike the grant and the contract, made a legislative withdrawal of the lands within the granted limits as soon as they should be indicated by the map of general route.

As to the lands within the indemnity limits, the contract was based upon two contingencies; that of losing lands within the granted limits, and being able to find sufficient to indemnify the company among the odd-numbered sections within a further limit of ten miles. Here the interest of the company was so remote and contingent, being a mere potentiality, and not a grant, that Congress declined to order a withdrawal for the benefit of the same, or even a survey within the territories.

It is apparent from the granting clause of said act that the grant was not one of quantity, but for a certain number of sections in place; and if not there, then it gave the privilege of looking for the deficiency in restricted limits. Had Congress intended the company should absolutely have the full quantity of land designated, it would not have restricted the right to select to the odd sections within ten miles, but would have placed no lateral limit upon the right of selection, as in the case of the Burlington and Missouri River Railroad (98 U. S., 334). Therefore if the company does not get the full amount of the sections within the primary limits and fails to make up its losses in the secondary limits, there is no violation of contract anywhere, that I can see; but only the happening of a contingency plainly contemplated by the granting act, subject to which the company made its contract.

Were I called upon to treat as an original proposition the question as to the legal authority of the Secretary to withdraw from the operation of the settlement laws lands within the indemnity limits of said grant, I should at least have such doubts of the existence of any such authority as to have restrained me of its exercise. It would seem that the very words of the act, "the odd-numbered sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company, as provided in this act," of themselves indicate most clearly the legislative will that there should not be withdrawn for the benefit of said company from sale or entry any other lands, except the odd-numbered sections within the granted limits, as expressly designated in the act. But when the provision following this, in the very same sentence is considered—"but the provisions of the act of September, 1841, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled "an act to secure homesteads to actual settlers upon the public domain," approved May 20, 1862, *shall be* and the same are hereby extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company"—it is difficult to resist the conclusion that Congress intended that "all other lands excepting those hereby granted to said company" shall be open to settlement under

the pre-emption and homestead laws, and to prohibit the exercise of any discretion in the executive in the matter of determining what lands shall or shall not be withdrawn.

Waiving all question as to whether or not said granting act took from the Secretary all authority to withdraw said indemnity limits from settlement, it is manifest that the said act gave no special authority or direction to the executive to withdraw said lands; and when such withdrawal was made it was done by virtue of the general authority over such matters possessed by the Secretary of the Interior, and in the exercise of his discretion; so that, were the withdrawal to be revoked, no law would be violated, no contract broken. The company would be placed exactly in the position which the law gave it, and deprived of no rights acquired thereunder. It would yet have its right to select indemnity for lost lands, but in so doing it would have no advantage over the settler, as it now has in contravention of the policy of the government in denial of the rights unquestionably conferred upon settlers by the land laws of the country, apparently specially protected by the provisions of the granting act under consideration.

Having examined the act of Congress and ascertained just what grant or contract was made, I turn to the assertion that no proper opportunity has been afforded the company to identify or select either granted or indemnity lands along a large part of its line, because of the failure of the government to make the necessary surveys. On the mere statement of this position, conceding its truth, it would seem that a revocation of the withdrawal as to the unsurveyed lands would be an act of great injustice on the part of the executive, especially as the company alleges that it offered (and the fact is conceded) to advance and deposit a sufficient sum of money to cover the cost of said surveys, which offer was declined by the Land Office.

In relation to this offer to deposit the cost of survey, I have to say that I know of no law that authorizes the officers of the land department to accept or use such deposit of money for the purpose named. There are laws which authorize special deposits for the purpose of making surveys at the instance of settlers, and also laws relating to the surveys of private grants. But there is no law that I have found which authorizes such deposits for the purpose of surveying lands within railroad limits.

The law, which it is claimed, authorizes the acceptance of the company's offer, is the act of July 31, 1876, (19 Stats. 121), relating to surveys of public lands. This act says:

That before any land granted to any railroad by the United States, shall be conveyed to such company, * * * there shall be first paid into the Treasury of the United States the cost of surveying, selecting and conveying the same, by said company or persons in interest.

Under this law the proper officers of the government have authority to receive from the company such sums as would cover the expenses spoken

of, but I do not construe it so as to authorize a deposit in advance, of an estimated sum for the purpose of making a survey of the railroad lands and which deposit instead of being paid into the Treasury, as the law says, is to be retained by the Commissioner and used as he may think best. It is clear that the payment required by the act is only the reimbursement to the government of the expense of surveying, etc., of such lands as the company may be entitled to. The company is only entitled to the alternate odd numbered sections within the limits fixed, and, if it were to get all these, it would get but one-half of the lands which must necessarily be surveyed along its line; and for this half only does the law exact payment and authorize the receipt of money by its officers. If the officers of the Land Department were to accept a deposit from the company in advance, and devote it to surveying railroad lands, money would still be necessary to pay for the survey of the other half of the lands, for it is utterly impossible to survey the odd sections without surveying those bearing even numbers.

The proposal of the company to furnish enough money to cover the whole expense of a survey, and let it stand as a deposit for future adjustment,—in other words, to lend the Commissioner of the General Land Office a sum of money which the law did not authorize him to borrow, in order to do that which the law-making power had omitted to do, but which the company wanted done,—was very properly declined (See 9 C. L. O., 99,) and his action was approved by this Department.

The matter of appropriating money to make public surveys is one entirely within the province of Congress, and, if on a failure to make, what the Commissioner might think was an adequate appropriation, that officer should borrow a sum of money in order to do that which he thought ought to be done, he would not only be acting outside of the law, but in actual violation of its express provisions.

When this grant was made to the Atlantic and Pacific Railroad Company, it is true, the act directed the survey of the granted limits in the territories, and ten miles beyond both granted and indemnity limits in the States, but the grantees well knew that such surveys could only be commenced and completed when a proper appropriation was made by Congress; and subject to the convenience of Congress and the contingency of that appropriation, the grant was accepted. The right to order such surveys is entirely beyond the power of the executive, who can only administer the laws as enacted, and who can only expend as directed such money as has been duly appropriated, having no authority to draw such money from any other source.

The attention of Congress has been repeatedly called to the subject of these surveys, but in the exercise of its wisdom it has not thought proper to make such appropriations as were suggested, and the matter remains exactly where it was when the grant was made.

This Department, charged with the administration of the land laws, acted with the utmost, if not questionable, liberality when it withdrew the land in the indemnity belt—a liberality which Congress declined to exhibit. This liberality was further shown by the fact that the indemnity lands were withdrawn long before a mile of road was built, and continued withdrawn long after the time prescribed by law for its construction had expired; and more than liberality is shown, in that, during the period of said withdrawals, the company is allowed to present and have approved by the local officers its list of selections without giving public notice of any kind; whilst the pre-emption or homestead settler, though his residence upon and cultivation of his land has been open and notorious for years, is compelled to give thirty days' notice by advertisement and posting, before he is allowed to show by proof a right to his home, so that any one interested may appear and protest on the day named against said proof, or contest his right. And the Department is not now to be charged with injustice or illiberality because it does not propose to keep in perpetual reservation a territory of such vast extent as was withdrawn for the benefit of this road.

Criticism upon the alleged shortcomings of the government with respect to this grant come with an ill grace from this company. The people, whom the government represents, had some rights under the grant, as well as the company. That act was not passed and that contract made for the sole benefit of the company. Mutuality in benefit was expected and intended, and mutual obligations were entered into; and equity and good conscience would require of both parties a faithful observance of these obligations.

The Atlantic and Pacific Company proposed to build a rail road from Springfield, Missouri, thence to the western boundary of the State; thence to a point on the Canadian river; thence to the town of Albuquerque, in New Mexico, thence to the head waters of the Colorado Chiquito; thence along the thirty fifth parallel of latitude to the Colorado river; thence to the Pacific Ocean. The government was asked to make a grant of land to aid in the construction of this proposed road. This was done in a most liberal manner; but it was provided by the 8th section of the granting act:

That each and every grant, right and privilege herein are so made and given to and accepted by said Atlantic and Pacific Rail Road Company upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish and complete *the main line of the whole road* by the fourth day of July, anno Domini 1878.

Did the company comply with this clear and specific contract? Did it commence the construction of its road in the two years named? Did it prosecute the work as required? Did it complete its main line at the time named? In fact *has it yet completed the main line?*

If at the time this company applied for its grant, it had stated its purpose was to build the proposed road, or so much of it as it might desire, from time to time, and in such fragments, or to and from such points as pleased its management, and that the government should withdraw from entry and settlement along its whole line all the land in both granted and indemnity limits, and keep such lands in a state of indefinite withdrawal to wait the pleasure or convenience of the company, is it believed for a moment that Congress would have listened to the application for a grant? Yet this is exactly what the company now insists Congress has done; with the further assertion that though the company may violate every specification of its contract, the government is bound in equity, not only to carry out the contract on its side but to guarantee to it a monopoly for an indefinite period of a vast part of the public domain not contemplated by the grant. I do not so understand either the law or the equity of the case.

On a full consideration of the whole subject I conclude that the withdrawal for indemnity purposes if permissible under the law was solely by virtue of executive authority, and may be revoked by the same authority; that such revocation would not be a violation of either law or equity, and that said lands having been so long withheld for the benefit of the company, the time has arrived when public policy and justice demand the withdrawal should be revoked and some regard had for the rights of those seeking and needing homes on the public domain.

If I had any doubt I would be confirmed in this course by what may be regarded as a distinct recognition by Congress of the correctness of its policy, to be found in Section 3, of the Act of April 21, 1876 (19 Stats., 35) where it is said:

That all such pre-emption and homestead entries, which may have been made by the permission of the Land Department, or in pursuance of the rules and instructions thereof, within the limits of any land grant at a time subsequent to the expiration of such grants, shall be deemed valid; and a compliance with the laws and the making of the proof required shall entitle the holder of such claim to a patent.

I therefore direct that all lands under withdrawals heretofore made and held for indemnity purposes under the grant to the Atlantic and Pacific Railroad Company be restored to the public domain and opened to settlement under the general land laws, except such lands as may be covered by approved selections; provided the restoration shall not affect rights acquired within the primary or granted limits of any other congressional grant. As to the lands covered by unapproved selections applications to make filings and entries thereon may be received, noted and held subject to the claim of the company, of which claim the applicant must be distinctly informed, and memoranda thereof entered upon his papers. Whenever such application to file or enter is presented, alleging upon sufficient *prima facie* showing that the land is from any cause not subject to the company's right of selection, notice thereof will be given to the proper representative of the company, which will be

allowed thirty days after service of said notice within which to present objections to the allowance of such filing or entry. Should the company fail to respond or show cause before the local officers why the application should not be allowed, said application for filing or entry will be admitted, and the selection held for cancellation; but should the company appear and show cause, an investigation will be ordered under the rules of practice to determine whether said land is subject to the right of the company to make selection of the same, which shall be determined by the register and receiver, subject to the right of appeal in either party.

When appeals are taken from the decision of the register and receiver to your office in the class of cases herein provided for, you will dispose of them without delay, and if the decision of your office shall be in favor of the company, and no appeal be taken, the land shall be approved or certified for patent, without requiring further action on the part of the company except the payment of fees and dues. If the decision of your office should be adverse to the company, and no appeal be taken, the selection will be canceled, and the filing or entry be allowed; subject to compliance with law.

The order of revocation herein directed shall take effect as soon as issued, but filings and entries of the lands embraced therein shall not be received until after giving notice of the same by public advertisement for a period of thirty days, it being the intention of this order that, as against actual settlement hereafter made, the orders of the Department withdrawing said lands shall no longer be an obstacle. Rights heretofore attaching, both of the company and of settlers, will be decided according to the facts in each case.

If any lists of selections have been presented by the company with tender of fees, which have been rejected and not placed on file and noted on the records of the local office, you will, if said lists are in your office or in the local office, cause said selections to be noted on the record immediately; and if such lists are not in your office or the local office, you will advise the attorney of the company that they will be allowed to file in the local office said lists of selections, and the same will be noted on the records as of the date when first presented; provided the same be presented before the lands are opened to filings and entries.

NOTE.—Following this decision, and acting upon the respective answers filed under the rule of May 23d, Mr. Secretary Lamar, on August 15th, 1887, revoked the orders of withdrawal made for the benefit of the following named companies: Alabama and Chattanooga R. R. Co., California and Oregon Land Company, California and Oregon R. R. Co. consolidated with the Central Pacific R. R. Co., Chicago, St. Paul, Minneapolis and Omaha Ry. Co., Dalles Military Road Co., Flint and Pere Marquette R. R. Co., Florida Railway and Navigation Co., Gulf and

Ship Island R. R. Co., Marquette, Houghton and Ontonagon R. R. Co., Missouri, Kansas and Texas Ry. Co., Mobile and Girard Railroad Co., New Orleans Pacific Ry. Co., Northern Pacific R. R. Co., Oregon and California R. R. Co., Oregon Central Wagon Road Co., Pensacola and Atlantic R. R. Co., St. Louis, Iron Mountain, and Southern Ry. Co., St. Paul and Duluth R. R. Co., Southern Pacific R. R. Co., Tennessee and Coosa R. R. Co., Vicksburg and Meridian R. R. Co., Vicksburg, Shreveport and Pacific R. R. Co., Wisconsin Central R. R. Co., Wisconsin Farm Mortgage Co.

PRACTICE—DEATH OF CONTESTANT.

FITZSIMMONS v. MEDER.

The right acquired by a contestant is personal, and on his death the question at issue is between the entryman and the government.

Acting Secretary Muldrow to Commissioner Sparks. August 2, 1887.

I have considered the case of Charles E. Fitzsimmons *v.* William Meder, on appeal of defendant from your decision of October 19, 1885, holding for cancellation his homestead entry for the NW. $\frac{1}{4}$ of Sec. 8, T. 145, R. 65, Fargo district, Dakota.

April 26, 1883, Meder made his entry. July 21, 1884, Fitzsimmons initiated contest, alleging abandonment. Hearing was had before the judge of the probate court of Foster county, Dakota Territory, on September 10, 1884; and on September 15th the local office dismissed the contest.

It was shown by the testimony that the claimant made settlement and built a shanty in April, 1883; that he had ten acres broken in May and June, 1883; staid on the land several days in July, 1883; that in October, 1883, he built a sod shanty—the former shanty having been destroyed by a prairie fire September 29, 1883; that he lived there a week in October, 1883, and in April, 1884, built another house eight by twelve feet, and lived therein three or four days; that he again visited the tract on July 14, 1884, and remained for six or seven days; that he returned a day or two afterward, dug a well, sixteen feet deep, and built an addition to his house; that he was poor, and worked for the Northern Pacific Railroad at Jamestown, thirty miles distant.

The defendant has filed corroborated affidavits, setting forth that the contestant died in April, 1885. That a contestant acquires a personal privilege only appears to be well settled by *Morgan v. Doyle* (3 L. D., 5), and cases cited. The claim is now uncontested and the question is between the entryman and the government.

The affidavits further state that improvements to the value of \$250 have been placed on the land, with house sixteen by fourteen, cooking utensils, household goods, etc., and thirty acres put in cultivation.

These affidavits not having been before you at the time of your decision, they, together with the papers accompanying your letter of transmittal, dated March 18, 1886, are returned for your further consideration.

HOMESTEAD ENTRY—ACT OF JUNE 15, 1880.

WATTS v. WILLIAMS.

Purchase under the second section of the act of June 15, 1880, cannot be made by a transferee of the original entryman, if such transferee is in fact not the real party in interest.

Acting Secretary Muldrow to Commissioner Sparks, August 5, 1887.

I have considered the case of Charles L. Watts v. Mary L. Williams, involving the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 31, T. 21 N., R. 16 E., Montgomery, Alabama, appealed by Watts from the decision of your office, dated May 21, 1885, rejecting his application to make a homestead entry on said land, and holding for approval for patent the cash entry of Mary L. Williams.

It is made satisfactorily to appear from the record in the case that one Norton made a homestead entry on the land in controversy in August, 1870; that on August 4, 1874, said Norton made a quit-claim deed of all interest he may then have had in said land to Mary L. Williams, the defendant in appeal; that on April 25, 1879, said entry was canceled for failure to make final proof; that on March 14, 1881, Mrs. Williams made application to purchase said land under the provisions of the second section of the act of June 15, 1880; that on March 10, 1882, the appellant Watts made application to enter the same as a homestead; that on July 1, 1882, Mrs. Williams, by quit claim deed—good in equity though defective in law, by reason of a misdescription—conveyed all of her right and interest in said land to one William O. Baldwin; that on July 5, 1882, Mrs. Williams was allowed to make cash entry as the transferee of Norton, the original entryman; and that the Secretary of the Interior, on December 31, 1884, ordered a hearing before the local land officers to determine the respective rights of Mr. Watts and Mrs. Williams to the land in controversy.

A hearing was had in pursuance of this order before the register of the land office at Montgomery, Alabama, in February, 1885, the receiver having been by agreement of parties excused from sitting in the case because of his relationship to one of the parties. The register decided in favor of Mrs. Williams, holding her cash entry to be valid, and you have affirmed that decision. From this affirmance the present appeal is prosecuted by Watts.

The third error assigned, and the only one which it is thought necessary to notice, is that at the time Mrs. Williams was permitted to make

cash entry she was not in fact the real party in interest. This objection is well taken. On July 1, 1882, Mrs. Williams by her own voluntary act and deed divested herself of all interest which she may have had in this land as the assignee of Norton. To permit her on the fifth of the same month to make cash entry for the benefit of another party was erroneous.

The decision of your office is therefore reversed, and you will please cause the cash entry of Mary L. Williams to be canceled, and permit the appellant to make homestead entry under his application, if he be still a qualified entryman.

HOMESTEAD ENTRY—CONTRACT TO CONVEY—ALIENATION.

MATTHIESSEN & WARD v. WILLIAMS.

The fact that prior to entry, or final proof, the entryman made a contract to convey his homestead claim in whole or in part to another after final proof, will not *per se* invalidate his claim. The agreement to convey is but a presumption of bad faith which may be rebutted by proof.

A deed made by the entryman prior to survey in adjustment of possessory rights, based on a mistake as to the location of the land, and covering a portion of that subsequently entered, but revoked prior to entry, is no bar to the perfection of the homestead claim.

Secretary Lamar to Commissioner Sparks, August 16, 1887.

Upon the application of counsel for Matthiessen and Ward, I suspended the operation of my decision of September 28, last, (5 L. D., 180) for the purpose of making a further examination of the issues involved in said case and the evidence submitted thereon.

The issues in said case may be stated under two general heads: (1) As to the right of Williams to make entry of the tract in dispute; and (2) As to the right of Matthiessen and Ward to purchase under the act of June 15, 1880. If there is no right of purchase under the act of June 15, 1880, in Matthiessen and Ward, or Joslyn, then the issue as to the superior right of the respective parties to the contest may be eliminated, and the issue reduced to the sole question between Williams and the government as to his good faith.

Matthiessen and Ward claim the right of purchase as grantees under a deed of conveyance from Joslyn, who filed a pre-emption claim for part of said tract December 4, 1875. It also appears, as stated by applicants in their brief, that "Joslyn, in order to preserve his own rights and those of his transferees, filed October 20, 1882, his application under the second section of the act of June 15, 1880, . . . to purchase one hundred and twenty acres of the land embraced in Williams entry, which application he renewed June 21, 1886," and now stands ready to do such further acts as may be required to secure his equitable rights and those of his transferees in the premises." It is therefore apparent

that Joslyn's action and standing in the case is solely for the benefit and interest of his transferees, Matthiessen and Ward. He relinquished his original claim (if any he possessed), and therefore has no standing as an entryman. Furthermore, one of the acts of bad faith charged against Williams is that he made an agreement with Joslyn by which Joslyn was to dismiss his contest and relinquish his claim to the one hundred and twenty acres, in consideration of which Williams was to transfer to Joslyn part of his homestead, after receiving patent therefor, and that acting under said agreement Joslyn dismissed his contest and relinquished his claim to the land.

If Williams's act in this regard was fraudulent and illegal, surely Joslyn could claim no right or equity under such a contract, because being himself a party to the alleged fraud, the courts will leave him where they found him and not aid him in reaping the fruits of it.

Without further comment on this branch of the case, it is sufficient to say that irrespective of the rights of Williams, Joslyn has no right of purchase under the act of June 15, 1880, and he could therefore convey no such right to Matthiessen and Ward.

As against the right of Williams to make homestead entry of the tract in controversy, it is charged, (1) That he agreed to convey to Donahue part of the land, after obtaining title to it; (2) That he agreed to convey part of the land to Joslyn, after obtaining title to it; (3) That at the time of his entry the land was within the limits of the site of a town; and (4) That at the time of entry the land was occupied for the purpose of trade and business.

These charges were all passed upon in the original trial of the case. Subsequently, Secretary Teller directed that further testimony be taken and transmitted direct to the Department. This testimony was mainly directed to the proof of an additional charge, to wit: that Williams had, on August 9, 1875, conveyed by deed to H. B. Campbell a portion of the land embraced in his homestead entry, which deed was of record at the date of final proof, and no reconveyance had been made to Williams by Campbell.

The first four charges were distinctly and specifically passed upon by Secretary Teller in his decision of July 17, 1884, affirming the action of the Commissioner and the local officers sustaining the validity of Williams's entry.

To this extent, at least, the subsequent testimony is cumulative, and while such additional testimony may have strengthened the testimony offered on a former trial as to the charges then made, a reference to the decision of my predecessor shows that he decided in favor of the validity of Williams's entry, not because the alleged agreement to convey to Donahue and Joslyn had not been proven, but for the reason that, as explained by Williams, such agreement to convey was not sufficient ground to warrant the cancellation of his entry. It was also held that the straggling population of what before was a mere mining camp did

not constitute a selection for a town site, and that the trade and business carried on there was not such as is contemplated in the statute as exempting the land from homestead and preemption entry.

Following a safe rule of action that where there are concurring opinions of the Secretary, the Commissioner, and the local officers, sustaining the validity of an entry, a reviewing tribunal will not disturb their decision if there was any evidence to support it, and unless it is unquestionably contrary to law, I might dismiss the further consideration of this case as to the points adjudged by them. But I am unable to see any error in their said decision. The Department held in *Aldrich v. Anderson* (2 L. D., 71), that "a contract for the future conveyance of part of a homestead claim is void, and will not affect the legal status of the claimant. Only an absolute conveyance will defeat his right."

While the land department may unquestionably inquire into such acts of a homesteader in determining whether his entry was made in good faith, the fact that prior to entry or final proof the entryman had made a contract to convey his homestead claim in whole or in part to another, after making final proof, will not *per se* invalidate his claim. The agreement to convey is but a presumption of bad faith which may be rebutted by proof. See also *Guyton v. Prince* (2 L. D., 143); *Foster v. Breen* (*Ib.*, 232).

The agreement made with Donahue was to convey a part of the land embraced in his homestead entry after making final proof, which was shortly after the survey of the township canceled by consent of both parties.

The contract made with Joslyn could not have been enforced, and in fact the complaint made against Williams is that he never intended to enforce it. In this view it could not be claimed that he ever intended to make a contract by which the title should inure in whole or in part to Joslyn.

There being no conveyance to either of these parties or even contract to convey that could be enforced, Williams could properly make the oath at date of final proof, "that no part of such land had been alienated," and the land department decided that the contract or agreement to alienate it, as explained by Williams did not invalidate his entry.

The only remaining question is the conveyance made to Campbell. It is true that at the date of his final proof, a deed from Williams to Campbell conveying part of his entry was of record, and no reconveyance of said land by deed had been made from Campbell to Williams.

This fact standing alone and unexplained would be sufficient to invalidate the entry of Williams, but the proof is that this conveyance was made before the survey of the township, and without a knowledge on the part of either as to where the township lines would run. It was not intended as a conveyance of any part of Williams's entry, but merely of a possessory right to other land. When the township was sur-

veyed and it was found that the conveyance included Williams's improvements, Williams and Campbell agreed prior to entry that they should exchange, so that Williams might take the south-east forty and Campbell the north-east forty, and Williams made his entry accordingly. It was then agreed and understood between both parties that the conveyance was no longer binding, and should be revoked. After this contest was filed a deed of conveyance was made by Campbell to Williams in accordance with their agreement, and was dated as of the date the agreement was made. As this testimony is not impeached, and as the contract made between them was a contract that could be enforced as against each other, where it is admitted by both the grantor and grantee, the reconveyance may be considered as made of that day, and hence there was no conveyance from Williams to Campbell of any part of his homestead entry at the day of final proof.

Furthermore, their conduct subsequent to the agreement to cancel the deed and prior to entry confirm this testimony. Williams made entry of the south-east forty covered by the deed, and Campbell of the north-east forty, according to their agreement, and Campbell makes no claim to any part of Williams's entry.

I have given this matter a full and careful consideration, and independent of the weight that should be given to the prior decisions in the case, I am satisfied that my decision should not be disturbed.

My order of October 13, last is hereby revoked, and the decision of September 28, 1886, will be carried into execution.

JURISDICTION—CITIZENSHIP—RAILROAD GRANT.

SOUTHERN PAC. R. R. CO. v. SAUNDERS.

In case of decision by the local office against the government the Commissioner has authority, whether appeal is taken or not, to examine into the merits of the case and render judgment accordingly.

An alien can acquire no right to public land before filing declaration of his intention to become a citizen.

The settlement of a qualified pre-emptor, though unprotected by a filing, is sufficient to except a tract from the grant to this company.

Acting Secretary Muldrow to Commissioner Sparks, August 20, 1887.

This case involves the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and SW. $\frac{1}{4}$ of SE. $\frac{1}{4}$, Sec. 29, T. 8 N., R. 4 W., S. B. M., Los Angeles, California, and comes here on appeal by the Southern Pacific Railroad Company, from your decision dated September 26, 1885, rejecting its claim to said tracts and awarding to Charles Saunders the right to file pre-emption declaratory statement for the same.

Said tracts are within the primary limits of the grant to the appellant company under the act of Congress approved July 27, 1866 (14 Stat.,

292), the right of which attached upon the filing of its map of designated route in the General Land Office, January 3, 1867. A withdrawal of lands within the granted limits of the road was ordered by letter dated March 22, 1867, which was received at the local office May 21, ensuing.

The tracts are also within the primary limits of the grant to the Atlantic and Pacific Railroad Company; but as the grant to this latter company in California was forfeited by the act of Congress approved July 6, 1886 (24 Stat., 123), no notice need be taken of any claim of this company which may have existed prior to said forfeiture.

All the lands in said township eight were offered at public sale at Los Angeles on the 14th of February 1859.

November 19, 1874, Charles Saunders the claimant herein filed pre-emption declaratory statement No. 677 for the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 4, T. 17 N., R. 4 W., S. B. M., alleging settlement June 30, 1874.

June 4, 1885, Saunders applied to file amended pre-emption declaratory statement for the land in question, together with the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 32, same township and range, alleging that he settled thereon the first week in January 1867, and that his residence had been continuous since that date; that he had improved said tracts with the intention of making the same his permanent home; that he never claimed the land described in his first declaratory statement, and that said first filing was made out by one J. H. Wagner, a surveyor who mis-described the land he claimed, and upon which he was residing. With the last declaratory statement was filed the certificate of naturalization of said Saunders, showing that he was duly admitted to the full rights of citizenship April 15, 1879.

The local officers upon this showing rejected the application of Saunders to file for the land in dispute, and after more than sixty days he appealed to your office. Objection was made by the company to the consideration of said appeal, because it was not filed within the time required by the rules of practice, which objection was overruled by you on the ground that the local officers had mis-applied the law in the case, and that therefore under rule 48 you had jurisdiction to examine into the merits of the case independently of any appeal whatever. You thereupon reversed the decision of the local officers, and directed them to allow the filing of Saunders without any hearing to show the truth of his allegations as to settlement, residence etc., holding that the facts in the case could be fully and finally investigated when he should offer final proof. Wherefore the appeal herein.

It is insisted in the appeal, First: That you erred in reversing the decision of the local officers when the appeal therefrom was not filed in time; Secondly: That even assuming the settlement of Saunders to have been made at the time alleged by him, it was not necessarily prior to the attachment of the railroad right, and even if it were prior to that right in order to be protected, a declaratory statement should have been

fled within thirty days thereafter, the land having been once offered ; and, Thirdly : That at the time Saunders alleged settlement, he was an alien, not qualified to make a legal settlement under the pre-emption law, and that therefore in no event can his claim defeat the grant to the company.

The first alleged error is met by the second clause in the exceptions to rule 48, viz: That the decision of the local officers will not be considered final when it is contrary to existing laws or regulations." You considered that the local officers had misapplied the law in the case, and therefore, under said rule it was your duty to overrule their decision. Moreover, they were not overruled on the facts in case, but only upon the law, and that in the interest of the United States. Where a decision of the local officers is against the United States you have always, by virtue of your supervisory authority over them, jurisdiction and authority to examine into the merits of the case, and to render judgment in accordance with your views in the matter. *Morrison v. McKisick* (5 L. D., 245.)

As regards the second alleged error it is true the allegations of Saunders as to the date of his settlement are not very definite: He says he settled on the land in dispute in the first week in January 1867. As already stated the right of the company attached January 3, 1867—that is on Thursday. So that the allegations of Saunders as to his settlement may be perfectly true, and yet he may have settled after the attachment of the railroad right. The other branch of the second objection can not be sustained. For if Saunders actually settled on or before the 3rd of January 1867, and was at that time a qualified pre-emptor, the fact that he failed to file his declaratory statement within the time specified in the Statute can not operate to his detriment. *Emmerson v. Central Pacific Railroad Company*. (3 L. D. 117), same case (id., 271).

A question of much more importance is raised by the third allegation of error, viz: That in 1867 Saunders was an alien and therefore incapacitated from initiating or asserting any claim to public lands of the United States. But here, even, the record fails to show the actual facts in the case. True, it shows that Saunders became a duly naturalized citizen on the 15th of April, 1879, but it does not show when he declared his intention to become a citizen of the United States.

It has been the uniform rule of the Department that an alien can acquire no rights to government land prior to the time he filed his declaration of intention to become a citizen. *McMurdie v. Central Pacific R. R. Co.* (8 C. L. O., 36), *Kelly v. Quast* (2 L. D., 627), *Maun v. Huk* (3 id., 452), and *Ross v. Poole* (4 id., 116). See also *Boyce v. Danz* (29 Mich., 146).

As already-stated it is not shown by the present record when Saunders declared his intention to become a citizen of the United States. So that until it is shown that he settled upon the land in dispute prior

to the attachment of the railroad grant, and that he was at that time qualified to make settlement, his filing should not be received. *James et al. v. Nolan* (5 L. D., 526).

You will therefore direct the local officers to order a hearing in this case, citing thereto the parties in interest to determine the exact date of Saunders's settlement on the land in question, the exact date when he declared his intention to become a citizen of the United States, and any other fact or facts material to the issue herein.

The decision appealed from is so modified.

HALF BREED SCRIP—AUTHORITY TO LOCATE.

JAMES M. HOWARD.

Possession of the scrip having been by former departmental decision accorded one who subsequently assigned the same, the location thereof under such assignment is not dependent upon the right of the locator to act as the agent of the party to whom the scrip was originally issued.

Acting Secretary Muldrow to Commissioner Sparks August 22, 1887.

I have considered the matter of the application of James M. Howard for a patent for the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 27, in T. 153 N., R. 60 W., Grand Forks, Dakota, appealed from the decision of your office dated February 19, 1887, holding for cancellation the scrip location made by said Howard, June 23, 1883, on an unsurveyed tract of land which was afterwards made to conform to the above description.

The location was made with Red Lake and Pembina half breed scrip issued to one Joseph Gardepie in conformity with the provisions of article seven of the supplementary treaty between the United States and the Red Lake and Pembina bands of Chippewa Indians concluded at Washington April 12, 1864. The part of said article bearing on the question under consideration is as follows: "It is further agreed by the parties hereto, that in lieu of the lands provided for the mixed bloods by article eight of said treaty concluded at the Old Crossing of Red Lake River, scrip shall be issued to such of said mixed bloods as shall so elect, which shall entitle the holder to a like amount of land, and may be located etc." (13 Stat. 690)

In making said location Howard assumed to act as the attorney in fact of Gardepie and you hold that he had no authority to so act, and that therefore the location made by him should be canceled. The conclusion reached by you that Howard was not duly authorized as the *agent of Gardepie* to make this location is concurred in by me; but I cannot reach the conclusion that therefore the location should be canceled, and applicant denied a patent to the land.

It appears from the record, and from a decision rendered by Secretary Kirkwood, February 3, 1882, involving the question of who was entitled to the possession of the scrip which has since been located upon the above described land, that, on June 22, 1877, said scrip was located on the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and lot three Sec. 13, and the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, and the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 12, all in T. 155 N., R. 51 W., Dakota Territory, by one Donald McDonald, the duly authorized attorney in fact of said Gardepie; and that on the same day one Jacob Lovell Jr., the duly authorized attorney in fact of Gardepie, sold and conveyed by deed of warranty, the last above described land, to said McDonald, for the consideration of three hundred and fifty dollars; and that on August 10, 1881, this location was canceled because of being in conflict with a pre-emption filing on the same tract.

After this cancellation, and after the death of said McDonald, his widow, Frances McDonald, the sole executrix of his will, applied to the land office for said scrip, claiming that it was a part of the estate of Donald McDonald, deceased. The office held that she was not entitled to it. That the conveyance of the land did not carry with it the title to the scrip, and that it was the property of Gardepie. From this decision Mrs. McDonald appealed, on which appeal the departmental decision above referred to was rendered. In this decision Secretary Kirkwood in speaking of said scrip says, "we find it in the custody of the government whose plain duty, it seems to me, is to return it to the attorney who filed it, and who was at the date of filing in proper legal possession of it. Especially is this duty plain since no protest appears from any source against such action. But it is suggested that the Attorney, McDonald, is dead. Then it should go to his executor or legal representative, to be accounted for as a part of his effects, since in law it was presumed to be in his possession, and among his effects at his death . . . The only loser by the failure of location was McDonald, and it would seem only equitable that the scrip should be placed where McDonald, or his estate, might not suffer loss on account thereof, and might be enabled to repair, to some extent, the loss already sustained." The scrip was directed by said decision to be surrendered to McDonald's legal representatives.

The Secretary, however, says that his decision is not to be construed as authorizing Mrs. McDonald to locate the scrip. "or as giving her, or any one under the will, any ownership or property therein," and says, "should the scrip in future be presented for location, the question as to the authority of the holder to locate the same would then become a proper one for consideration."

At first view this language may seem inconsistent with that first above quoted, but it only evinces that prudent caution which declines passing definitely on a question not absolutely necessary to be determined at that time, and which might possibly again come before him in a new aspect. Possibly at some future time when this scrip should

be presented for location, Gardepie, or his heirs or assigns might protest against its location for the benefit of another, and might be able to show that such location should not be made.

It seems to me, however, that Secretary Kirkwood clearly decided that under the facts as presented to him, Mrs. McDonald was the legal holder of this scrip, and that it belonged to the estate of Donald McDonald.

From a power of attorney executed May 20, 1832, by Mrs. McDonald as the legal representative of Donald McDonald, deceased, and from other circumstances connected with this case, it satisfactorily appears that said McDonald transferred to some one said scrip, and that she was not at the time the same was located the holder thereof, and in the absence of any protest from any source against the location of said scrip by James M. Howard, or against a patent issuing to him for the land on which it was located, the presumption is that he was at the time said location was made the legal holder of said scrip, and as such entitled to a patent for the land on which it was located; the said supplemental treaty providing that this scrip "shall entitle the holder to a like amount of land" (160 acres).

Possession of this scrip having been given to Mrs. McDonald by a former decision of this Department for the purpose of guarding Donald McDonald's estate against loss on account of the cancellation of the location made in 1877, and the decision of your office being based solely on the ground that Howard had no authority from Gardepie to make the present location, your said decision for the reasons herein given is reversed.

PRE-EMPTION FILING—OSAGE LAND.

ALFRED E. SANFORD.

The right to make pre-emption filing can be exercised but once, and such right is exhausted though the filing is subsequently transmuted to a homestead entry.

Acting Secretary Muldrow to Commissioner Sparks, August 27, 1887.

I am in receipt of your office letter of May 25, 1886, transmitting the appeal of Alfred E. Sanford from your office decision of January 5, 1886, rejecting his pre-emption proof for Lots 3 and 4 and the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 28, T. 26 S., R. 24 W. (Osage lands), Garden City district, Kansas.

Sanford filed Osage declaratory statement for the tract described May 27, alleging settlement May 26, 1884.

Prior to the above date—to wit, March 16, 1878—said Sanford had filed pre-emption declaratory statement for the SW. $\frac{1}{4}$ of Sec. 20, T. 19 S., R. 23 W., same district.

Your decision holds that "the Osage lands are disposed of under the general principles of pre-emption law; therefore a party who has heretofore exercised the pre-emption privilege, either for the public lands or the trust lands, is disqualified from again filing (except, in the latter event, if he were resident on such lands at the date of the passage of the act of May 9, 1872)."

Defendant appeals upon the ground that he never purchased the tract for which he first made pre-emption filing, but transmuted it into a homestead entry, on April 17, 1878 (one month after filing), and that therefore he should not be considered as having exhausted his rights under the pre-emption law; furthermore, that "it is a well established rule that the filing for a pre-emption works an abandonment of a homestead then held"—hence his filing for said Osage land "was an abandonment of his previously made homestead entry, and the same can in no way affect his right to enter said Osage land."

The fact that Sanford transmuted his first pre-emption filing into a homestead entry does not relieve him from the inhibition contained in Section 2261 of the Revised Statutes:

No person shall be entitled to more than one pre-emptive right by virtue of the provisions of section 2259 (permitting such right), nor where a party has filed his declaration of intention to claim the benefits of such provisions for one tract of land, shall he file, at any future time, a second declaration for another tract.

The question at issue in the case at bar is similar in its essential features to that of John Gunn, decided by Mr. Secretary Kirkwood, July 21, 1881. Said Gunn, May 20th, 1870, filed pre-emption declaratory statement for the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 11, and the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 14, T. 96, R. 58, Yankton district, Dakota. He afterward transmuted said filing into a homestead entry. On July 16, 1878, he filed a second declaratory statement—this time for the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 11, and the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 2, same township and range as before. Your office rejected his filing as being contrary to the provisions of section 2261 (above quoted). Gunn appealed to the Department, which decided that "his right of pre-emption was clearly exhausted by his filing in 1870, notwithstanding his transmutation thereof into a homestead entry." Such has been the doctrine and the practice of the Department ever since, and I see no reason for making any change therein.

The first ground of appeal being decided adversely to appellant, the others advanced by him need not be discussed.

For the reasons herein given, I affirm your decision.

MINING CLAIM—ENTRY BY DEPUTY SURVEYOR.

LOCK LODE.

The mineral entry of a deputy mineral surveyor within the district for which he is appointed is not in violation of any statute or departmental regulation, but particular care should be exercised in the allowance of such entries.

Acting Secretary Muldrow to Commissioner Sparks, August 25, 1887.

On the 1st of September, 1881, Charles J. Moore located the Lock Lode claim, situated in California mining district, Lake county, Colorado; and on the 4th of March, 1882, he made an application to the register and receiver at Leadville, in said State, for a patent therefor. His proofs being satisfactory, the register and receiver, on the 21st of December, 1883, allowed his application as mineral entry No. 1969.

January 7, 1886, you held said entry for cancellation, because at the time it was made and prior to the said location the entryman was a deputy mineral surveyor in said mining district. Appeal was taken, and the case has been considered.

But one question is in this case, viz: The right of a deputy mineral surveyor to make a mineral entry in the district for which he is appointed.

Section 2319 of the U. S. Revised Statutes provides:

All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

Section 2325 of the U. S. Revised Statutes provides that any one authorized to *locate* a mineral claim may procure a patent for the same upon compliance with certain requirements and conditions therein specified.

Deputy surveyors are appointed by the surveyor-general of each surveying district, under and by virtue of the authority conferred in section 2334 of the U. S. Revised Statutes. Under this section the surveyor-generals of the several districts appoint as many competent deputy surveyors for mining claims as may apply to them for such appointment, and give bond in the sum of \$10,000 for the faithful performance of their duties. A mineral claimant then has the option of employing any one of said deputies to do his surveying with whom he can make a suitable contract, it being always understood that the claimant is to bear all the expenses of notices, surveys, &c.

It was ruled by your office, February 6, 1884, in the case of Denison and Willits (11 C. L. O., 261), — the only time the question has ever been raised, so far as can now be ascertained—that a deputy mineral

surveyor may make mineral land entries in his own district, but in that event he can not act in any other capacity than that of claimant.

There is nothing in the statute preventing such entries, and so far as I can ascertain there has been nothing in any of the regulations of the Department to prevent their being made.

It is true the deputy surveyor is in one sense an officer of the United States in the mining district for which he is appointed. Now, it has been uniformly held by the Department that registers and receivers and their clerks can not be allowed to make entries of public land in their respective land districts, except as provided in section 2287 of the U. S. Revised Statutes, the reason being that they will be called to pass upon their own proofs, and are always in a much better position to ascertain the status of desirable tracts of land than outside parties. *State of Nebraska v. Dorrington et al.* (2 C. L. L., 647), and Circular of August 23, 1876 (id., 1448). This is a wise and just rule, based upon sound principles of public policy.

But it has also been ruled that a register, receiver or clerk in a local land office may make a timber culture entry in a district other than the one in which he is located, for there the reasons assigned for refusing the entry in their own districts do not exist. Instructions August 28, 1883 (2 L. D., 313).

As regards the particular case under consideration, it is shown that Mr. Moore appears in no other capacity than that of claimant. He located the lode claim, another deputy surveyor, not connected with the claim, surveyed it, and still another individual in no wise connected therewith did the notarial work in the premises.

It would seem that there can be no valid objection to this entry as a matter of public policy, unless it be said that claimant's position as a deputy surveyor gives him an advantage over the rest of the community in locating claims—in other words, his position gives him special information as regards the places where valuable minerals are to be found. I am not of opinion, however, that this objection should be sufficient to work a forfeiture of an entry already made, or to prevent the making of one. In all such cases, though, the claimant should show his good faith beyond any question of doubt; and it would not be improper, I think, to examine such cases with particular care and scrutiny to ascertain clearly that no provision of law or regulation of the Department has been violated.

Your decision is therefore reversed.

HARRIS v. MAYNE.

Motion for review of the departmental decision of April 23, 1887, (5 L. D., 599) overruled by Acting Secretary Muldrow, August 29, 1887.

HOMESTEAD ENTRY—COMMUTATION—FINAL PROOF.

IDA MAY TAYLOR.

By commutation the original entry is merged in the cash entry, and by operation of law the cancellation of the latter is also in effect the cancellation of the former. The submission of final proof prior to payment under the practice then existing in the local office, and in view of the explanation given and the acceptance of claimant's money, should not defeat the consideration of such proof.

Acting Secretary Muldrow to Commissioner Sparks, August 31, 1887.

I have considered the record, transmitted by your letter of March 6, 1886, in relation to the cash entry of Ida May Taylor for the NW. $\frac{1}{4}$ of Sec. 16, T. 151, R. 67, Devil's Lake land district, Dakota.

It appears that the plat of said township was filed March 18, 1884, and on April 9, 1884, Miss Taylor made homestead entry of the tract in question, alleging settlement July 15, 1883. After due notice, final proof was made by her on July 14, 1884; but payment was not made and final certificate issued until two months thereafter, September 18, 1884.

On May 28, 1885, referring to this interval between the making proof and the payment; and also stating that the proof as to residence, cultivation and improvement was unsatisfactory, Assistant Commissioner Harrison rejected the same, and held the cash entry for cancellation. Notice of this decision, it appears, was sent to claimant by mail on June 6, 1885; and on August 2, 1885, W. C. Sivy, signing himself "attorney for claimant," filed in the local office an application, addressed to the Commissioner of the General Land Office, asking for an extension of the time within which to file an appeal, for thirty days, because of change of claimant's post-office address notice of the adverse decision had not been received in time to prepare the appeal papers. This application was received by your office on the 22d of the same month, and there is nothing in the record to show any special action in relation thereto at that time.

On September 3, 1885, the appeal of Miss Taylor was filed in the local office, and duly received at yours on September 18, 1885.

On December 29, 1885, considering these matters, and the further fact that the affidavit of claimant, accompanying her said appeal, was sworn to before a notary in Minnesota, your office was "of the opinion that" claimant had "attempted to perpetrate a fraud on the government by false swearing"; her homestead entry was held for cancellation, and sixty days allowed for appeal. In the same decision it was ruled that claimant had lost her right of appeal from the cancellation of her cash entry, because "the same was not taken within the sixty days allowed, and that the application as made by attorney for claimant for extension of time was frivolous and would not have been allowed had the fact of claimant's absence in Minnesota been made to appear."

From this last decision claimant appealed, on February 1, 1886, and the papers were transmitted to this Department.

On May 28, 1885, when Acting Commissioner Harrison held for cancellation the cash entry, by operation of law he also held for cancellation the homestead entry which was merged in the former; the cancellation of the one necessarily destroying the homestead right conferred by the other. Consequently the subsequent action of your office, on December 29, 1885, in holding for cancellation the homestead entry was simply inoperative, because seeking to do that which had already been done.

However this may be, claimant had a right to be duly notified of the action of your office, May 28, 1885, holding for cancellation the cash entry. In *Churchill v. Seeley* (4 L. D., 589), it was held that in order to debar a party of the right of appeal it must be "shown affirmatively" that notice of the decision was given in accordance with rule 17; that is, in writing and served either personally or by registered letter. It does not "affirmatively" appear that the notice in this case was served by registered letter; for the register and receiver only say she was "advised by mail." This notice "by mail" was not received by her or her attorney until July 31, 1885, as stated by the latter in his written application for an extension of time. This statement, under the ruling in the case of the *New Orleans Canal & Banking Co. v. Louisiana* (5 L. D., 479), constitutes proof of personal service on that day. Being the sole evidence of such service in the record, the claimant is only chargeable with notice from that time.

The appeal was perfected and filed on September 3, 1885,—within the sixty days allowed by law after notice—and on filing it in your office, the case should have been transmitted to this Department. The case will therefore be considered as upon that appeal, without regard to the subsequent action of your office, which can not affect the rights of the appellant, because beyond its authority. See case of *John M. Walker*, (5 L. D., 504).

There were two principal objections made by your office to the final proof submitted. The first was as to the interval of two months which elapsed between the time of making proof, and the time of making payment.

This proof was made July 14, 1884, at which time there was no prohibition, either in law or the rules and regulations, against the making of proof and payment at different times; and it was usual to accept such proof, when otherwise satisfactory, if the dilatory action was shown not to have been caused by bad faith or other impropriety on the part of the entryman. But, on November 18, 1884, this practice was prohibited by circular (3 L. D., 188) of your office, and the local officers were directed thereafter not to receive the proof until parties were prepared to make payment also.

In this particular case, Miss Taylor states in an affidavit that prior to making her proof she had made arrangements with a Loan and Trust Company to furnish funds on proof day, viz: July 14, 1884, to pay for her land, but on said day, without any previous notice, she was informed by said company that funds could not be furnished." She also says that on stating the case to the officers at the Devils Lake office she was told by them that a reasonable time would be allowed her to procure funds, and that sixty to ninety days was considered such reasonable time. And she further says that she was unable to obtain the necessary funds sooner than September 18, 1884, when the payment was made and certificate issued.

Under the then existing practice of the local office, the statements made to claimant and the acceptance of her money, the irregularity in relation to said payment should be treated as cured.

I pass to the second objection made by your office to said proof, viz: the meagreness of the improvements and cultivation, notwithstanding the claim of residence since July, 1883—a year before making proof.

The testimony shows that residence on the tract was established July 15, 1883,—eight months prior to the filing of the township plat—the building of a frame house, eight by ten feet, strip lapped and tar papered and sealed inside, the digging of a well and fifteen acres of breaking. The testimony also shows that the claimant is a single woman, and has resided on the tract "continuously since July 15, 1883," and that her improvements are worth \$250.

It seems to me that if the facts stated above are true, and their truth is not questioned, they show a sufficient compliance with the requirements of the homestead law, and Miss Taylor is entitled to her patent, in the absence of any bad faith on her part.

But, in addition to this testimony, duly corroborated, she furnishes a supplementary affidavit, also duly corroborated, wherein she explains with much detail and circumstantiality the difficulties and expense she had to encounter in her effort to obtain this home.

The land in question is close to the western boundary of the Devil's Lake Indian Reservation, and she says that shortly after her settlement the Indian Agent, claiming that said reservation extended several miles further west, repeatedly ordered claimant and other settlers to vacate their lands; and that until the boundary line between the public lands and said reservation was authoritatively determined claimant was deterred from doing more than build her house and dig a well; and that the settlement of the boundary line in favor of the settlers was not known until too late in the fall of 1883 to do any breaking that year. That in the spring of 1884, after living on said land all the winter, the claimant was without the means of paying for more than fifteen acres of breaking, which cost, at five dollars per acre, \$75. She also shows that the lumber of which her house was built was hauled from Bartlett, the nearest railroad station—sixty miles away—costing her \$40 per

thousand, making the house cost her \$125. That in addition she paid \$50 for her well—the whole improvements costing \$250.

On this showing I think this woman is entitled to this land. I therefore reverse your judgment, and direct the approval of the proof for patent.

FINAL PROOF—ESSENTIAL REQUIREMENTS.

ALBERT L. LENT.

It is essential that final proof should be taken at the time and place designated in the notice.

Acting Secretary Muldrow to Commissioner Sparks, August 31, 1887.

I have considered the application of Albert L. Lent for review and reversal of departmental decision of March 17th ultimo, in the matter of his cash entry for NW. $\frac{1}{4}$ of Sec. 17, T. 156, R. 54, Grand Fork, Dakota Territory.

It appears Lent made homestead entry of the tract in question April 10, 1882, and gave notice of his intention to commute the same to cash before E. O. Faulkner, judge of probate court, at Kensington, December 12, 1882. But in fact said proof was made, on that day, before C. A. M. Spencer, a notary public, at Grafton. On the examination of the proof by your office, the said entry was suspended on January 4, 1884, and Lent advised through the local officers "that unless he could show the proof was taken at the time and place advertised, the same would be rejected for irregularity."

From this action Lent appealed, stating, with his appeal, that the probate judge not being able to be present on the day appointed, the proof was taken before the notary public. On receipt of this statement your office rejected said proof and held Lent's entry for cancellation, notifying him that his appeal from the interlocutory order of suspension would be treated as an appeal from the latter action holding the entry for cancellation, and the case was forwarded to this Department on said appeal.

On consideration of the case here, on March 17, 1887, your office decision was modified, the proof was rejected, and claimant "allowed to make new proof, showing compliance with law up to date of making the same, in accordance with rule three of circular approved February 21, 1887 (5 L. D., 426)."

Lent furnishes no new matter for consideration with his present application. He urges, however, that no shadow of fraud or evasion exists in his case; that the objection to his proof was technical, a mere irregularity, as to the place advertised, being shown; that the acceptance of the proof by the local officers raises a strong presumption of good faith in his behalf, and the lapse of four years since that time, without a charge of fraud, greatly strengthens that presumption; and

that residing now in New York, great hardship and expense would be inflicted upon him if the requirement of the former decision is insisted upon.

In answer to all this, it is to be said that these matters were fully considered at the time of making the former decision, except as to the residence of claimant in New York; and I find no good reason in this matter of changed residence for reversing my former action.

When the act of Congress of March 3, 1879 (20 Stat., 472), directed that notice should be given by parties of their intention to make final proof, it was clearly intended that the time and place should be designated in said notice; and, as a corollary to such requirement, that the proof must be made at said time and place; the object being to afford to all the world an opportunity then and there to appear and protest against said proof, if so inclined.

The objection therefore is not merely a technical one, nor is the failure to make proof at the appointed place a simple irregularity. But the requirement is most essential for the protection of the government against frauds, and private interests from the rapacity of designing men. Such notice, as the proof was made under in this case, is of no more validity or legal efficacy than if no notice whatever had been given by the entryman. With the requirement of the law as to notice the officers of the Land Department have no authority whatever to dispense; and the approval by the local officers of proof, against the making of which no proper opportunity to protest had been afforded, can add nothing to the strength thereof; but is calculated to inspire suspicion of an imposition upon those officers, or to bring down upon them the severe and just censure of their superiors.

The application for review is rejected.

OSAGE FILING—FINAL PROOF—DEPARTMENTAL REGULATIONS.

ROGERS v. LUKENS.

A departmental regulation in due conformity with statutory authority has all the force and effect of law.

Failure to submit final proof within six months after Osage filing, as required by the regulations of the Land Department, renders the claim thereunder subject to any valid intervening right.

Acting Secretary Muldrow to Commissioner Sparks, September 2, 1887.

I have examined the case presented by the appeal of Isadore Rogers from the decision of your office, wherein her claim to the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 33, T. 30 S., R. 10 W., and lot 4 Sec. 4, T. 31 S., R. 10 W., Wichita, Kansas was held subject to that of N. H. Lukens.

It appears from the records, as shown by the papers before me, that Lukens filed Osage declaratory statement for said land January 26, 1885.

alleging settlement January 1, 1885, and that Mrs. Rogers placed of record an Osage filing for said tract May 4, 1885, claiming settlement February 13, 1885.

On June 24, 1885, Mrs. Rogers gave notice of her intention to make final proof on August 13, 1885, at which time said proof was duly submitted. On the protest of Lukens a hearing was set for October 20, 1885. Lukens made final proof September 12, 1885, having given due notice thereof.

The local office acting on the evidence submitted, and the record before them decided February 2, 1886, that both parties had acted in good faith in the matter of settlement and cultivation, and that the only question for determination was whether the parties had complied with the law in making final proof, and on that point ruled that as Lukens did not make his proof within six months from filing, his right must be held subject to that of the adverse claimant, and accordingly awarded the land to Mrs. Rogers.

Your office when the case came before it August 13, 1886, on the appeal of Lukens, reversed the decision of the local officers, holding that Lukens was the prior settler, and that his right should not be defeated through failure to make final proof within the required period, "in favor of one who went upon the tract with full knowledge of his (Lukens) improvements, and who the testimony suggests is there in the interest of the Cattle Company."

At the hearing Lukens filed an amended affidavit as the basis of protest, alleging that his first act of settlement was in November 1884, and that his residence was continuous from February 16, 1885.

The following facts are fairly established by the evidence: In the latter part of November 1884, Lukens went upon the land and broke about three fourths of an acre, having, prior thereto, purchased a small house that had been erected thereon by his son. During December 1884, and January 1885, Lukens lived with his son and made no attempt at residing on the land. February 13, 1885, parties acting for Mrs. Rogers came upon the land with lumber for the construction of a house and began work thereon the next day, when they were waited upon by Mr. Lukens and informed that he had filed for the land and expected to maintain his claim. February 16, Lukens established himself in the old house, repairing the same somewhat, and on the same day, but later, Mrs. Rogers reached the land. From that date both parties appear to have resided upon the land up to the hearing, and to have shown due compliance with the law in the matter of cultivation and improvement.

About two months after Mrs. Rogers settlement, the Carlisle Cattle Company built a fence enclosing a large tract of land including this claim. For a short time some of the herders and fencebuilders boarded at Mrs. Rogers, a storm having destroyed their tent. Some evidence was offered to show that the general opinion of the neighborhood was

that Mrs. Rogers claim had been made in the interest of the cattle company, but the opinion thus testified to seems to rest largely upon the opinions expressed by claimant Lukens and his relatives. On Mrs. Rogers behalf the existence of such a public or general opinion was denied in evidence, and she testifies that the land is taken solely for her own benefit.

I concur in the finding of your office that Lukens was the prior settler, but your conclusion that his failure to make final proof within the required period did not render his claim subject to the intervening right of Mrs. Rogers I cannot accept.

The act of May 28, 1880 (21 Stat., 143) under which these lands are offered for disposition, does not fix any specified time within which final proof must be made, but does provide that the Secretary of the Interior shall make all rules and regulations necessary to carry into effect the provisions of this act. Under this authority the regulations of June 23, 1881, were formulated, in which it was required that filing should follow settlement within three months, and final proof be submitted within six months after filing: (5 L. D., 309) and said requirement has since been followed, and is now in force as will be seen by reference to the circular of April 26, 1887, (5 L. D., 581) A regulation thus made, and in due conformity with the statute, has all the force and effect of the law. *Minor v. Marriott* (2 L. D. 709); *Henry W. Fuss* (5 id., 167).

The decision of your office in effect admits that if the claim of Mrs. Rogers had been made in good faith it would have taken precedence, on Lukens failure to make proof within said period. But it was held in said decision that his rights should not be defeated by such failure in favor of one who went upon the land with full knowledge of his improvements, and who the evidence "suggests" is there in the interest of the Cattle Company.

While it is true that the prior settlement and improvement of Lukens put all subsequent settlers on notice as to his claim, yet he could only maintain such priority by due compliance with law. Now it is conceded that his final proof was not made in time. By this failure his priority was lost, and his rights became subject to any valid intervening claim. The validity of Mrs. Rogers claim is only questioned on the ground that it was made in the interest of the cattle company. But the evidence does not warrant such a conclusion. She has testified under oath that her claim was made solely for the purpose of securing a home for herself and children. It is not made to appear that she was in any way responsible for, or should be charged with the acts of the cattle company. The local officers, with all of the witnesses before them found that Mrs. Rogers had acted in good faith, and it would seem that the evidence fairly justified such finding.

It appearing therefore that Lukens failed to make final proof as required, his claim must be held subject to that of Mrs. Rogers.

The decision under consideration is according reversed.

DESERT LAND—ENTRY BY MARRIED WOMAN.*

* * * * *

In section two you say that a married woman can not make a desert land entry. This is changing the established rule of the Department. Secretary Schurz, on the 15th of December, 1880, ruled expressly that a married woman may make a desert land entry, if she in other respects be duly qualified. (9 C. L. O., 222.) This rule was followed in the recent case of *Sears v. Almy*, decided here June 3, 1887 (6 L. D., 1). Although this question was not made a point in this last case, the record distinctly showed that the party to whom the land was awarded was a married woman at the date of her application and also when the entry was allowed. I can see nothing in the statute forbidding such entry. The desert land act does not, like the homestead, pre-emption and timber culture laws, restrict entries under its provisions to the heads of families but it says that "any citizen of the United States or any person of requisite age who may be entitled to become a citizen," etc., may make entry, etc.

* * * * *

LANDS CHIEFLY VALUABLE FOR TIMBER AND STONE—ACT OF JUNE 3, 1878.

CIRCULAR.

Commissioner Sparks to registers and receivers, May 21, 1887.

The act of June 3, 1878, (20 Stat., 89), for the sale of timber lands in the States of California, Oregon, Nevada and in Washington Territory, limits the quantity of land which may lawfully be acquired under the act by any one person or association, to not exceeding 160 acres.

2. The land must be valuable chiefly for timber (or stone) and unfit for cultivation if the timber were removed.

3. It must be unoffered, unreserved, unappropriated and uninhabited, and without improvements, (except for ditch or canal purposes), save such as were made by, or belong to the applicant.

4. Lands containing valuable deposits of gold, silver, cinnabar, copper or coal, are not subject to entry under this act.

5. One entry or filing only can be allowed any person, or association of persons. A married woman may be permitted to purchase under said act, provided the laws of the State or Territory in which the entry is made permit a married woman to purchase and hold real estate as a feme sole but in addition to the proofs already provided for, she shall make affidavit at the time of entry that she proposes to purchase said

* Extract from departmental letter of June 23, 1887, returning draft of proposed circular.

land with her separate money, in which her husband has no interest or claim; that said entry is made for her sole and separate use and benefit; that she has made no contract or agreement whereby any interest whatever therein will enure to the benefit of her husband, or any other person and that she has never made an entry under said act, or derived or had any interest whatever, directly or indirectly in or from a former entry made by any person or association of persons.

6. A person applying to purchase a tract under the provisions of this act is required to make affidavit before the register or receiver that he has made no prior application under this act; that he is by birth or naturalization a citizen of the United States, or has declared his intention to become a citizen. If native born, parol evidence to that fact will be sufficient; if not native born, record evidence of the prescribed qualification must be furnished. The affidavit must designate by legal subdivisions the tract which the applicant desires to purchase, setting forth its character as above; stating that the same is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited; contains no mining or other improvements, except for ditch or canal purposes, (if any exist), save such as were made by or belong to the applicant, nor, as deponent verily believes, any valuable deposit of gold, silver, cinuabar, copper, or coal; that deponent does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whomsoever, by which the title he may acquire from the government of the United States shall inure in whole or in part, to the benefit of any person except himself.

7. Every person swearing falsely to any such affidavit is guilty of perjury and will be punished as provided by law for such offense. In addition thereto, the money that may be paid for the land is forfeited, and all conveyances of the land or of any right, title, or claim thereto, are absolutely null and void as against the United States.

8. The sworn statement before the register and receiver required as above (section 2 of the act) must be made upon the personal knowledge of applicant, except in the particulars in which the statute provides that the affidavit may be made upon information and belief.

9. You will in every case read this affidavit to applicant, or cause it to be read to him in your presence before he is sworn or his signature is attached thereto.

10. The published notice required by the third section of the act must state the time and place when, and name the officer before whom, the party intends to offer proof, which must be after the expiration of the sixty days of publication, and before ninety days from the date of the published notice. Where proof is not made before the expiration of said ninety days the register and receiver will cancel the filing upon

their records and notify this office accordingly, as prescribed by instructions of circular of May 1, 1880, (7 C. L. O., 52).

11. The evidence to be furnished to the satisfaction of the register and receiver at time of entry, as required by the 3d section of the act, must be taken before the register or receiver, and will consist of the testimony of claimant, corroborated by the testimony of two disinterested witnesses. The testimony will be reduced to writing by you upon the blanks provided for the purpose, after verbally propounding the questions set forth in the printed forms. You will test the accuracy of affiant's information and the bona fides of the entry, by close and sufficient oral examination. You will especially direct such examination to ascertain whether the entry is made in good faith for the appropriation of the land to the entryman's own use, and not for sale or speculation, and whether he has conveyed the land or his right thereto, or agreed to make any such conveyance or whether he has directly or indirectly entered into any contract or agreement in any manner with any person or persons whomsoever by which the title that may be acquired by the entry shall inure in whole or in part to the benefit of any person or persons except himself. You will certify to the fact of such oral examination, its sufficiency, and your satisfaction therewith.

12. Your attention is called to the instructions of this office of August 19, 1884, addressed to the register and receiver at Humboldt, California, (3 L. D. 84), in respect to scrutiny of applications and entries, the examination of parties and witnesses, and your duty in accepting, rejecting and reporting such applications and entries; and you will strictly follow and be governed by said instructions.

13. The entire proof must be taken at one and the same time, and payment must be made at the time of offering proof. Proofs will in no case be accepted in the absence of a tender of the money; and the register's certificate will in no case be given to the party or his attorney, but must be handed directly to the receiver by the register; and no note will be made upon the plats or tract books until the receiver's receipt has been issued. The proof, certificate, and receipt must in all cases bear even date.

14. When an adverse claim, or any protest against accepting proof or allowing an entry, is filed before final certificate has been issued, you will at once order a hearing and will allow no entry until after your written determination upon such hearing has been rendered. You will report your final action in all protest and contest cases and transmit the papers to this office.

15. After certificate has been issued, contest, applications and protests will be submitted to this office as in other cases of contest after final entry.

16. Contests may be brought against timber and stone land applications or entries in accordance with rule one of rules of practice, either by an adverse claimant or by any other person, and for any sufficient cause affecting the legality or validity of the filing, entry or claim.

17. In case of an association of persons making application for an entry under this act each of the persons must prove the requisite qualifications, and their names must appear in the sworn statement, as in case of an individual person. They must also unite in the regular application for entry, which will be made in their joint names as in other cases of joint cash entry. The forms prescribed for cases of applications by individual persons may be adapted for use in applications of this class, and the sworn statement as to the character of the land may be made by one member of the association upon his personal knowledge.

18. No person who has made an individual entry or application can thereafter make one as a member of an association, nor can any member of an association making an entry or application, be allowed thereafter to make an individual entry or application.

19. Applicants to make timber land entries, and claimants and witnesses making final proof, must in all cases state their place of actual residence, their business or occupation, and their post-office address. It is not sufficient to name the county and State or Territory where a party lives but the town or city must be named, and if residence is in a city the street or number must be given.

The following forms are prescribed for applicant's sworn statement and final deposition.

TIMBER AND STONE LANDS—SWORN STATEMENT.

LAND OFFICE AT ——— . ——— .

(Date) ———, 18——.

I, ——— of (town or city) ———, county of ———, State (or Territory) of ———, desiring to avail myself of the provisions of the act of Congress of June 3, 1878, entitled "An act for the sale of timber lands in the State of California, Oregon, Nevada, and in Washington Territory," for the purchase of the — of section —, township —, of range —, in the district of lands subject to sale at ———, ——— do solemnly — that I am a native (or naturalized) citizen (or have declared my intention to become a citizen *,) of the United States, of the age of —, and by occupation —; that I have personally examined said land and from my personal knowledge state that said land is unfit for cultivation, and valuable chiefly for its —; that it is uninhabited; that it contains no mining or other improvements—; nor, as I verily believe, any valuable deposit of gold, silver, cinnabar, copper, or coal; that I have made no other application under said act; that I do not apply to purchase the land above described on speculation, but in good faith to appropriate it to my own exclusive use and benefit and that I have not, directly or indirectly, made any agreement or contract, or in any way or manner, with any person or persons whomsoever, by which the title

* In case the party has been naturalized or has declared his intention to become a citizen, a certified copy of his certificate of naturalization or declaration of intention, as the case may be, must be furnished,

I may acquire from the government of the United States may inure in whole or in part to the benefit of any person except myself, and that my post-office address is ————.

I hereby certify that the foregoing affidavit was read to affiant in my presence before he signed his name thereto; that said affiant is to me personally known (or has been satisfactorily identified before me by ————), and that I verily believe him to be the person he represents himself to be; and that this affidavit was subscribed and sworn to before me this — day of ———, 18—.

Register (or Receiver).

TIMBER AND STONE LANDS.—TESTIMONY OF ————.

———, being called as a witness in support of his application to purchase the — of section — township —, of range —, testifies as follows:

Ques. 1. What is your post-office address, and where do you reside?

Ans. ———.

Ques. 2. What is your occupation?

Ans. ———.

Ques. 3. Are you the identical person who applied to purchase this land on the — day of ——— 18—, and made the sworn statement assigned by law before the Register (or Receiver) on that day?

Ans. ———.

Ques. 4. Are you acquainted with the land above described by personal inspection of each of its smallest legal subdivisions?

Ans. ———.

Ques. 5. When and in what manner was such inspection made?

Ans. ———.

Ques. 6. Is the land occupied; or are there any improvements on it not made for ditch or canal purposes, or which were not made by, or do not belong to you?

Ans. ———.

Ques. 7. Is the land fit for cultivation; or would it be fit for cultivation if the timber were removed?

Ans. ———.

Ques. 8. What is the situation of this land, and what is the nature of the soil, and what causes render the land unfit for cultivation?

Ans. ———.

Ques. 9. Are there any salines, or indications of deposits of gold, silver, cinnabar, copper, or coal on this land? If so, state what they are, and whether the springs or mineral deposits are valuable.

Ans. ———.

Ques. 10. Is the land more valuable for mineral or any other purposes than for the timber or stone thereon, or is it chiefly valuable for timber or stone?

Ans. ———.

Ques. 11. From what facts do you conclude that the land is chiefly valuable for timber or stone?

Ans. _____.

Ques. 12. What is the estimated market value of the timber standing upon this land?

Ans. _____.

Ques. 13. Have you sold or transferred your claim to this land since making your sworn statement, or have you directly or indirectly made any agreement or contract, in any way or manner, with any person whomsoever, by which the title which he may acquire from the government of the United States may inure, in whole or in part, to the benefit of any person except yourself?

Ans. _____.

Ques. 14. Do you make this entry in good faith for the appropriation of the land exclusively to your own use and not for the use or benefit of any other person?

Ans. _____.

Ques. 15. Has any other person than yourself, or has any firm corporation, or association, any interest in the entry you are now making, or in the land? or in the timber thereon?

Ans. _____.

I hereby certify that the above named _____ personally appeared before me, that his identity as the person who made sworn statement for the tract of land above named before the Register (or Receiver) on the _____ day of _____, 18—; that I verily believe affiant to be the person he represents himself to be; and that each question and answer in the foregoing testimony was read to him in my presence before he signed his name thereto, and that the same was subscribed and sworn to before me at _____ this _____ day of _____, 18—.

A strict compliance with the foregoing regulations is required.

Approved, July 16, 1887.

L. Q. C. LAMAR,
Secretary.

TIMBER CULTURE—OSAGE ORANGE.*

In regard to Osage Orange being *timber* within the meaning of the law, it may be said generally that it depends very much upon the locality and also the manner in which it is grown. If grown as a hedge, as

* Extract from departmental letter of July 6, 1887. returning draft of proposed circular.

it is in many instances, it could not be considered timber; but if planted as the timber culture law directs in a country where it will grow to be a tree, as it does in many parts of the United States, it is then timber, within the meaning of the law.

* * * * *

PRE-EMPTION—FINAL PROOF—RESIDENCE.

UNITED STATES *v.* SKAHEN.

The pre-emption law and the regulations of the Department thereunder require settlement, improvement and continuous personal residence upon the land in good faith by the pre-emptor for a period of not less than six months, and unless the final proof shows these facts affirmatively it should be rejected by the local office.

Acting Secretary Muldrow to Commissioner Sparks, July 25, 1887.

I have considered the case of the United States *v.* John J. Skahen, on appeal by the latter from the decision of your office, dated December 12, 1885, holding for cancellation his pre-emption cash entry No. 418 of the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 27, T. 123 N., R. 62 W., made November 28, 1882, at the Aberdeen land office, in the Territory of Dakota.

The record shows that said Skahen filed his pre-emption declaratory statement No. 7562 for said tract on April 28th, alleging settlement April 25, 1882. On October 2, same year, claimant gave due notice of his intention to make proof and payment for said land before the local land officers on November 18th following.

The final proof made at the date appointed shows that the claimant was a single man, duly qualified to make said entry; that he settled upon said tract at the time designated in his said filing; that his first act of settlement was digging a well and building a house, eight by ten feet; that his improvements consist of said frame house and five acres of land broken and back-set—all valued at \$75; that he first established his actual residence on said land April 25, 1882, which has been continuous, and that he has not cultivated to crop said tract, except to cut thereon three tons of hay. The local land officers accepted said proof and payment for the land, and issued thereon said cash certificate. On August 18, 1883, a special agent of your office reported said entry for cancellation. On May 28, 1884, your office directed the local land officers to order a hearing, which was duly had on May 16, 1885.

From the evidence submitted before them, the local land officers decided that there is "nothing in the testimony in any manner reflecting upon the good faith of the claimant, or the general truthfulness of his statements as set forth in his final proof, or any evidence of fraudulent intent," and they recommended that the entry should be approved for patent.

On December 12, 1885, your office considered the testimony in the case, and held that the testimony of the claimant showed that during the time between the date of settlement and date of final proof, he was part owner of a store at Bath, in said Territory, and "was constantly engaged in attending to his business in the village"; that he made a practice to go and sleep on the claim from three to five times a week, upon such occasions eating his breakfast in the shanty, which he built on the land; that on days which he visited the claim he took dinner at the hotel in Bath, and on other days took all of his meals at said hotel and slept on the counter in his store.

The decision appealed from also finds that the claimant, within a month after making final proof, sold his shanty for \$35, and the same was moved from the land; that, at date of entry, only five acres of said tract had been broken, and that "there is nothing in the testimony to indicate that Skahen ever entertained the intention of abandoning mercantile pursuits to engage in agriculture, or of making his actual home upon the land claimed."

At the hearing the claimant testified that "the actual cash outlay for improvements was about \$77.50; that he established his residence upon said land on the 28th of April, 1882, and resided thereon for seven months up to date of final proof." This testimony is corroborated.

The final proof fails to show that the claimant was asked if he had been absent from the land for any time during the period for which residence is claimed on the land.

There is nothing in the testimony that necessarily conflicts with or contradicts the final proof upon which the local land officers received the claimant's money and issued cash certificate thereon.

This Department has repeatedly held that residence may be established the instant that a claimant goes upon a tract of public land for that purpose. *Goodnight v. Anderson* (2 L. D., 624); *Grimshaw v. Taylor* (4 L. D., 330). Nor does it necessarily follow that a claimant must abandon the business in which he is engaged in order that he may acquire title to land under the pre-emption law. *Henry Buchman* (3 L. D., 223).

The question is not, did the claimant carry on any other business than agriculture, but rather did he comply with the pre-emption law as to inhabitancy and improvement.

This Department held in the case of *Andrew J. Healey* (4 L. D., 80), that "No fixed rule can be formulated as to what shall constitute good faith. The facts and circumstances surrounding each case should be carefully considered, and if the acts of the entryman, as shown by the evidence do not clearly indicate bad faith, the entry should not be forfeited." To the same effect are the decisions of the Department in the cases of *Conlin v. Yarwood* (2 C. L. L., 593); *Eugene J. De Lendrecie* (3 L. D., 110).

The fact, as admitted by claimant, that shortly after making final proof he sold the house on said tract, is not of itself sufficient proof of fraud. If he had fully complied with the requirements of the pre-emption law and had received his certificate of purchase, he would have the right under the decisions of the courts and of this Department to sell or dispose of the land. *Myers v. Croft* (13 Wall., 295); *Morfev v. Barrows* (4 L. D., 135); *Thomas Nash* (5 L. D., 608).

While a careful consideration of the whole record fails to show that said entryman has acted in bad faith, yet I am not satisfied that upon the proof presented said entry should be passed to patent.

The pre-emption law and the regulations of the Department thereunder require settlement, improvement and personal continuous residence upon the land in good faith by the pre-emptor for a period of not less than six months, and unless the proof affirmatively shows these facts, it should be rejected by the local land officers. In the case at bar, since there is no adverse claimant, I think the pre-emptor should have an opportunity to furnish supplemental proof within a reasonable time, showing full compliance with the requirements of the pre-emption laws. You will please so advise the claimant.

The decision appealed from is modified accordingly.

PRACTICE—CERTIORARI—APPEAL.

ARIEL C. HARRIS.

The writ of certiorari will not be granted where the right of appeal is lost through failure to file the same in time.

Exception to such general rule will not be made though it appear that the case is *ex parte*, and that the right of appeal was lost through the negligence of attorneys.

Acting Secretary Muldrow to Commissioner Sparks, September 6, 1887.

This is an application for certiorari filed on behalf of Ariel C. Harris in the matter of his pre-emption cash entry No. 1034, embracing the SE $\frac{1}{4}$ of Sec. 6, T. 122 N., R. 65 W., Aberdeen, Dakota.

• From this application and accompanying exhibits the following material facts appear: May 21, 1886, your office, upon evidence taken at a hearing duly held upon the report of Special Agent Jaycox, to the effect that the entry of Harris was fraudulent, reversed the decision of the local office and held said entry for cancellation, subject to appeal. Appeal was not filed until July 20, 1887, the entry in the meantime having been canceled upon the records. Accompanying the appeal was a letter of explanation from the resident attorneys in this city relative to the delay in filing it. In this letter it is said:

In this connection, and explanatory of the delay in filing the appeal, we would state, that on the 29th of June, 1886, within the period allowed for appeal, we received a letter from the firm, of which J. Q. A. Braden,

Esq., who represented Harris as attorney in the case, is a member, authorizing us to appeal to the Secretary of the Interior from your said decision. On the day said letter was received the case was examined in your (the Commissioner's) office, with a view to appeal, and we advised Mr. Braden that an appeal would be duly filed.

We are now in receipt of a letter from Mr. Braden's firm, stating that the local officers had been directed to finally cancel the entry of Mr. Harris. We were surprised at this information, but on an examination of your files failed to find that an appeal had been presented, as we had contemplated doing.

By your office letter of July 26, 1887, addressed to said attorneys, the appeal was denied, because it had not been filed within the time required by the rules of practice. Hence the present application.

The only question presented by this application is as to whether the appeal was filed in time.

Under date of June 21, 1887, the local officers report that their records show that notice was given to Harris of the decision of May 21, 1886, "but whether personally or by registered letter does not appear, hence this office notified the claimant by registered letter, and encloses the return card therefor, no appeal having been taken." It appears that said return card bears date May 28, 1887, and is signed by J. Q. A. Braden, attorney for said Harris.

It is insisted that the time within which appeal should have been taken commenced to run against claimant May 28, 1887, when the notice by registered letter was mailed to claimant, and that under the ruling in the case of *Boggs v. West Las Animas Townsite* (5 L. D., 475), the appeal if filed on or before August 8, 1887 (seventy days), would have been in time. As before stated, the appeal was filed July 20, 1887.

I do not look with favor upon this proposition. While it may be true, and no doubt is true, that if there were nothing in the case relative to notice but the record made by the local officers, the time for appeal would be held to commence to run on May 28, 1887, it not affirmatively appearing from said records that the claimant had been properly notified of the decision of your office against him prior to that date, yet it must be observed that this application itself discloses the fact that notice was received by the attorney for claimant long prior to said last date.

The exact date Braden received notice of the decision of your office holding for cancellation the entry of his client does not appear. Nor is it material to the issue here. Certain it is, if the statements made in this application can be relied on, that he received notice of said decision prior to June 29, 1886—notice, too, by which he considered his client bound, for on that date the resident attorneys here received a letter from him directing them to appeal the case to the Department.

It is unfortunate, perhaps, for attorneys and client that the appeal was not then filed. The statement of counsel that they on said last mentioned date examined the case in your office is met by your statement

that at that time they had entered no appearance in the case, and that consequently they could not have then made said examination.

If it be held that claimant is chargeable with notice at least from June 29, 1886 (and I think there can be no error in such holding), then the time for appeal had gone by over nine months before said appeal was actually filed. In such a case the writ of certiorari will not be granted by the Department. *Cassidy v. Arey* (5 L. D., 235).

But it is urged that under the peculiar circumstances of this case—the claimant himself having directed his attorneys to appeal, and the failure to so appeal being chargeable to said attorneys alone, and because the case is *ex parte*—an exception should be made to the general rule.

I am not favorably impressed with this view of the case, either. There must be some limit as regards the time when an appeal from your office decisions must be taken. Otherwise business always remains unsettled. The land department has determined that limit and embodied its opinion in rules of practice 86, *et seq.* It may be that in some individual cases the enforcement of these rules will work hardship. But it is better to have an uniform rule on the subject, even though hardship be done in exceptional cases, than to have no rule at all, or, which is worse, to have a rule that is not enforced. Certainty in the law is always to be aimed at. And though in particular cases clients may be injured through the laches of their attorneys, yet upon the whole, I am convinced that the best interests of the Department will be subserved by relying upon fixed and well known rules.

The application is denied.

PRACTICE—APPEAL—HEARING.

JAMES H. MURRAY.

Though an appeal will not lie from a decision of the Commissioner ordering a hearing, the refusal to order a hearing is, when it amounts to the denial of a right, appealable.

Acting Secretary Muldrow to Commissioner Sparks, September 6, 1887.

James H. Murray by his attorney has filed an application for certiorari under rules of practice 83 and 84, in the matter of his commuted cash entry No. 6889—original homestead entry No. 2037—of the S. $\frac{1}{4}$ of SW. $\frac{1}{4}$, Sec. 5, SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$, Sec. 6, and NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, Sec. 8, T. 60 N., R. 15 W., Duluth, Minnesota.

From this application and accompanying exhibits the following material facts appear: Said homestead entry was made July 5, 1883, the township plat having been filed June 11, preceding, and commuted to cash entry December 27, 1883, upon proof showing settlement to have been made April 15, and residence established May 15, 1883; improve-

ments consisting of a log house, twelve by fourteen feet, one story high, two and a half acres cleared and cultivated in vegetables—all valued at \$250; continuous residence, the only absences being nine days in April, a few days in August and September, and sixteen or eighteen days in November, all of said absences being caused by claimant's being compelled to go to Duluth, seventy miles distant, for provisions; and that said tract was claimant's only home from May 15, 1883, to date of final proof.

May 5, 1885, your office suspended said cash entry, holding that the law as to residence had not been complied with in the premises, and gave claimant opportunity to furnish supplemental proof showing full compliance with the law. Thereupon claimant filed the affidavits of himself and several of his neighbors, setting out in detail the facts relative to residence, cultivation, improvement, etc., all asserting good faith on the part of claimant and that he had no other home, ever since final proof was made.

By decision, dated March 9, 1886, your office held this supplemental proof unsatisfactory, and held both the homestead and cash entries for cancellation, subject to appeal within sixty days. July 30, 1886, the local officers reported that claimant was notified of said decision holding his entry for cancellation March 17, 1886, and that no appeal had been filed. Thereupon on the 5th of October, 1886, you canceled said entries and directed the local officers to note the cancellation on the records of their office.

December 24, 1886, claimant filed in the local office application for a hearing, accompanying the same with several affidavits setting forth the facts and circumstances relative to his claim, and alleging that he had received no notice of your said decision of March 9, 1886, until after the time for appeal therefrom had elapsed. In his affidavit then filed the claimant alleged that he actually commenced to reside on his claim April 15, 1883, instead of May 15, 1883, as stated in the final proof, and that said statement in the final proof was an error for which the register of the land office was responsible.

Under date of March 24, 1887, the local officers wrote you in the matter of this application for rehearing, earnestly recommending that you grant said application, as claimant appeared to have acted in good faith and to have complied with the law as he understood it, he being an ignorant man unacquainted with the land laws; and as he had not received notice of the decision holding his entry for cancellation in time to comply with its requirements. With this same application was filed the affidavit of one Henry A. Blume, who it appears was allowed to file pre-emption declaratory statement for this land after the cancellation of Murray's entries. Blume alleges that when he settled upon the land there were improvements there amounting in value to \$350, consisting of a good log house, twelve by fourteen feet, with one door and window, and a good tight roof, and about three and a half acres of

breaking, and that said improvements as he believes belonged to James H. Murray, the claimant herein; that he now believes that Murray has been acting in good faith and that if he is permitted so to do he will withdraw his filing from this land and file for another tract.

April 6, 1887, your office upon consideration of the case as it then stood denied Murray's application for rehearing, holding that he did not appear to have exercised due diligence in the matter of said application.

From this last decision appeal was taken by Murray, which was denied by your office July 11, 1887, on the ground that the action which was sought to be reversed was on a matter entirely within the discretion of the Commissioner of the General Land Office, and therefore not appealable. Hence the present application.

If the statements made in this petition are true, I am of opinion claimant is entitled to relief. The record does not affirmatively show when Murray received notice of the decision holding his entry for cancellation. It does appear, however, that he did not receive said notice until after the expiration of the 70 days immediately succeeding the date notice was sent him by the local office. The facts as to notice, then, are not apparent from this application. But I am of opinion that your decision denying the appeal was error. The rule is well settled that an appeal will not lie from your decision *ordering* a hearing. But a decision *refusing* to order a hearing is, when it amounts to a denial of right, appealable. *Jackson v. McKeever* (3 L. D., 516), *Guyselman v. Shafer et al.* (id., 517).

Further, upon the statement of facts set out in this petition, it would seem that claimant has at all times complied with the law and has acted in good faith. His neighbors, the local officers and even the subsequent adverse claimant, are all firmly convinced of claimant's good faith in the premises, and that he has complied with the law.

In view of the foregoing, you will please certify the papers in the case to the Department, and in the meantime suspend all action in the matter until further advised.

PRACTICE—APPEAL—CERTIORARI.

SOUTHERN MINNESOTA RY. CO.

The right of appeal exists where the decision of the General Land Office amounts to a final determination on the merits of the case.

Acting Secretary Muldrow to Commissioner Sparks, September 6, 1887.

The Southern Minnesota Railroad Company by its attorneys has filed an application for certiorari in the matter of its claim to the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, and lots 4 and 5, Sec. 3, T. 109 N., R. 45 W., Tracy, Minnesota.

From this application and accompanying exhibits the following material facts appear: The lands specified are within the limits of an indemnity withdrawal for the benefit of this road, ordered by Commissioner's letter of May 17, 1871, received at local office May 27. These lands were then unsurveyed, and no settlement claim had then attached to them. The township plat was filed May 7, 1872.

August 1, 1872, Alexander Ross filed pre-emption declaratory statement No. 22,092 for this land, alleging settlement June 30, 1871. October 2, 1878, he transmuted the same to homestead entry 9571, upon which, after due published notice, he afterwards submitted final proof the railroad company not appearing, and received final certificate No. 3981.

By decision dated June 23, 1887, you approved the entry of Ross, so far as related to any question that might be raised against it by the Railroad company, on the grounds: First, That the withdrawal of May 27, 1871, was without effect as to the tracts specified, because they were then unsurveyed; Second, That the settlement of Ross subsequent to the date of the withdrawal, but before the filing of the township plat in the local office, excepted the lands from said withdrawal; and Third, That if this were not so, the railroad company forfeited all rights to the lands by a failure to select the same, and its failure to appear and dispute the claim of Ross when he made final proof, citing *Brady v. Southern Pacific Railroad Company*, (5 L. D., 407), and *Iverson v. St. Paul, Minneapolis and Manitoba Railroad Company*, (id., 586).

From this decision the railroad company appealed in due time, but by letter of August 3, 1887, addressed to the attorneys for the company, you denied said appeal substantially upon the ground that the company had no rights in and to the lands described, and that therefore it had no right of appeal. Wherefore the present application.

The question raised by this application is not as to whether your said decision *upon the merits* of the case may not be correct, but simply, whether assuming the facts to be as herein set forth, such decision was appealable. If the statements made in this application be true, it would seem that your said decision upon the merits of the case was, so far as your office is concerned, a final rejection of the company's claim to the tracts specified. It was not a decision upon an interlocutory order or decree, or upon a matter resting in your sound discretion. It was upon the merits of the case—upon matters as to which the company had the right to have the judgment of the Secretary of the Interior. It will not do to hold that a claimant has no right of appeal from a decision of your office, simply because in said decision the claim set up by him is rejected. The very fact that his claim is rejected and denied, is what gives him the right of appeal.

For the foregoing reasons the application is granted.

*RAILROAD GRANT—STATE RELINQUISHMENT.***ST. PAUL M. & M. RY. Co. v. CHADWICK.**

The company by accepting the terms fixed by the State Legislature, in extending the time for the construction of the road, relinquished its claim to lands occupied by actual settlers and authorized the Governor of the State to reconvey such lands to the United States.

Acting Secretary Muldrow to Commissioner Sparks, September 6, 1887.

The land in controversy herein is the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, Sec. 23, T. 128, R. 33, St. Cloud, Minnesota, and is located within the primary limits of the St. Vincent Extension of the St. Paul and Pacific Railroad, now St. Paul, Minneapolis and Manitoba Railway. It is therefore claimed by the latter company as inuring to it under the grant to Minnesota by act of Congress approved March 3, 1857 (11 Stat., 195), and the amendatory act approved March 3, 1865 (13 id., 526). It is also within the indemnity limits of the Northern Pacific Railroad Company. Edwin A. Chadwick lays claim to this land under the homestead law.

By decision, dated July 29, 1885, you rejected the claim of both companies and gave Chadwick the privilege of offering final proof. An appeal from this decision by the St. Paul, Minneapolis and Manitoba Company brings the case here for consideration.

The facts in the case are few and simple. The road past this land was definitely located December 9, 1871. At that date, so far as can now be ascertained, as well as at the date of the grant, the tract was vacant and unappropriated, and it therefore passed to the State in trust for the company authorized to build the road.

Now, by the terms of the granting acts, the construction of the road was a condition precedent to the conveyance of any land by the State to the company, with the exception of that granted for the first twenty miles of the road. *Farnsworth et al. v. Minnesota and Pacific Railroad Company* (92 U. S., 65), *Schulenberg v. Harriman* (21 Wall., 44).

The company of which the present company is the successor having failed to build its road within the time it was required to do so, the Minnesota legislature, on the first of March, 1877 (Laws of Minn., 19th Sess., Special, 257), enacted a law providing among other things for an extension of time within which the road was to be built. Among other conditions and limitations to the enjoyment of this benefit, embodied in the act, was the following :

Sec. 10. The Saint Paul and Pacific Railroad Company, or any company or corporation taking the benefits of this act, shall not in any manner, directly or indirectly, acquire or become seized of any right, title, interest, claim, or demand in or to any piece or parcel of land lying and being within the granted or indemnity limits of said branch lines of road, to which legal and full title has not been perfected in said Saint Paul and Pacific Railroad Company, or their successors or assigns,

upon which any person or persons have in good faith settled and made or acquired valuable improvements thereon, on or before the passage of this act, or upon any of said lands upon which has been filed any valid pre-emption or homestead filing or entry—not to exceed one hundred and sixty acres to any one actual settler; and the Governor of this State shall deed and relinquish to the United States all pieces or parcels of said lands so settled upon by any and all actual settlers as aforesaid, to the end that all such actual settlers may acquire title to the lands upon which they actually reside, from the United States, as homesteads or otherwise, and upon the acceptance of the provisions of this act by said company, it shall be deemed by the Governor of this State as a relinquishment by said company of all such lands so occupied by such actual settlers; and in deeding to the United States such lands, the Governor shall receive as *prima facie* evidence, of actual settlement on said lands, the testimony and evidence or copies thereof, heretofore or which may be hereafter taken in cases before the local United States land offices, and decided in favor of such settlers.

The section of road beyond Melrose, past the land in controversy, was not constructed until near the close of the year 1878. The certificate of the engineer of the road showing that the road from Melrose to Alexandria had been completed is dated January 23, 1879; and the certificate of the Governor to the same fact is dated January 31, 1879.

It is thus observed that at the date of the passage of the aforesaid act of the Legislature of Minnesota, "legal and full title" to this tract of land had not been perfected in the railway company.

Chadwick's settlement was made and his improvements were commenced, it appears, in 1876, prior to the passage of said act of the Legislature. Accordingly, on the 6th of July, 1880, the Governor of Minnesota, acting under the authority conferred upon him by said act of the State Legislature, executed a deed of relinquishment for this with other lands to the United States. In this instrument the State of Minnesota is mentioned as the party of the first part and the United States as the party of the second part, and it is declared that the said party of the first part—

has conveyed, released, and relinquished, and by these presents does grant, convey, deed, and release and relinquish unto the said party of the second part and assigns for the use and benefit of the persons hereinafter named the following described pieces and parcels of land lying and being within the granted and indemnity limits of the said line of railroad from St. Cloud to St. Vincent, for the use and benefit of the following named parties—

Edwin A. Chadwick, NE. $\frac{1}{4}$ 23-128-33.

To have and to hold all and singular the said premises unto the said party of second part and assigns forever to the uses and purposes aforesaid.

It would seem from the provisions of this deed of relinquishment that the United States became re-invested with the title to the tract of land in controversy, if the State through its Governor had the power to make such conveyance.

It is urged by the appellant that no such power existed in the State. It is admitted, however, by the appellant, "that if the railway company had concurred in the relinquishment, or deed of the State back to the United States, then neither the company nor the State would have any concern in the disposal of the land by the United States."

It would seem too plain for argument that the acceptance of the provisions of the said act of the Minnesota Legislature by the predecessor of the present company was in legal effect a consent by the then company to said deed of relinquishment. The company was then in laches in the building of its road. It was given further time within which to complete the construction of it. But this extension of time—this benefit—was granted only upon certain express conditions, one of which was that lands which would otherwise have passed to the company, but upon which actual settlers had located, should be relinquished by the company. The company accepted the provisions of this act. It can not be now claimed that it accepted the benefits, only, without accepted the conditions and limitations that were likewise imposed. In other words, by the acceptance of the terms of said act of the State Legislature, the railway company relinquished its claim and interest in and to this particular tract of land, and expressly authorized the Governor of the State of Minnesota to reconvey the same to the United States.

The appellant company, the successor of the railway company then in existence and to whom the act applied, has no greater rights in the premises than its predecessor had. It succeeded to the rights and benefits which its predecessor possessed, and likewise to the conditions and limitations that were imposed on it. That is all it ever possessed and all it can now claim. Its predecessor relinquished whatever rights it possessed in and to this tract of land, and the present company therefore has no rights in the premises which can be enforced.

A question almost identical with the one in the present case was considered by the Department in the case of the *St. Paul, Minneapolis and Manitoba Railway Company v. Morrison* (4 L. D., 300), same case (*id.*, 509), and the conclusion therein reached was the same as in this case. In that case the land was within the indemnity limits of the road, while in this case it is within the primary limits. The principle, however, under the Minnesota act is the same, and the conclusions in the two cases could not differ from each other.

For the foregoing reasons your decision is affirmed, the claim of the *St. Paul, Minneapolis and Manitoba Railway Company* is rejected, and Chadwick's final proof may be considered. The *Northern Pacific Railroad Company* is not now in the case.

RESTORATION OF INDEMNITY LANDS.

CIRCULAR.

WASHINGTON, D. C., September 6, 1887.

The Hon. Secretary of the Interior having revoked the indemnity withdrawals heretofore ordered for the benefit of certain railroad and wagon road companies and directed that all lands embraced therein be restored to the public domain and opened to settlement under the general land laws, the following is submitted in answer to the numerous inquiries relative thereto.

The order of revocation and restoration includes all the lands within the indemnity limits of the grants for the roads hereinafter mentioned (see Appendix A), except such lands as may be covered by approved selections, by which is meant selections which have been examined and approved by the Commissioner of this Office and the Secretary of the Interior. It is provided, however, that the order of restoration shall not affect rights acquired by grantees within the primary or granted limits of any other Congressional grant.

As to lands covered by unapproved selections, applications to make filings and entries thereon may be received, noted, and held subject to the claim of the company, of which claim the applicant must be distinctly informed and memoranda thereof entered upon his papers.

Whenever such application to file or enter is presented, alleging upon sufficient *prima facie* showing that the land is not from any cause subject to the company's right of selection, notice thereof will be given to the proper representative of the company, which will be allowed thirty days after service of said notice within which to present objections to the allowance of said filing or entry.

Should the company fail to respond or show cause before the district land officers why the application should not be allowed, said application for filing or entry will be admitted, and the selection held for cancellation; but should the company appear and show cause, an investigation will be ordered under the rules of practice to determine whether said land is subject to the right of the company to make selection of the same which will be determined by the register and receiver, subject to the right of appeal in either party.

When appeals are taken from the decision of the register and receiver to this Office in the class of cases above provided for, they will be disposed of without delay, and if the decision should be in favor of the company, and no appeal be taken, the land will be certified to the Secretary of the Interior for approval for patent without requiring further action on the part of the company except the payment of the required fees. If the decision should be adverse to the company, and no appeal be taken, the selection will be canceled and the filing or entry allowed subject to compliance with law.

Lands which have not been selected will be subject to settlement and entry as other public lands, and notice to the company will not be required.

The Secretary's orders revoking said indemnity withdrawals take effect from the date of the issue thereof (see Appendix A), so as to open the lands embraced therein to settlement, but filings and entries of said lands will not be received until notice of the restoration shall have been given by a public advertisement for a period of thirty days, it being the intention of the order of revocation that as against actual settlement thereafter made, the orders of the Department withdrawing said lands shall no longer be an obstacle. Rights, both of the company and of settlers, attaching prior to the issue of the Secretary's order, will be determined by the facts in each case.

The necessary instructions for the restoration of the lands affected by the Secretary's orders have been issued to the registers and receivers for the land districts in which the lands are situated (see Appendix B), to whom application to enter, or for any further information, should be made.

The restoration as ordered is to entry under the general land laws relating to settlement. Private cash entries of the restored lands will not be allowed.

S. M. STOCKSLAGER,
Acting Commissioner.

Approved:
H. L. MULBROW,
Acting Secretary.

APPENDIX A.

Statement showing names of roads, the dates of the several orders of revocation, and the location of the lands affected thereby.

NAME OF ROAD.	DATE OF ORDER.	LOCATION OF LANDS.
Alabama and Chattanooga Railroad.....	Aug. 15, 1887	Alabama.
Atlantic and Pacific Railroad	Aug. 13, 1887	Arkansas, New Mexico, and Arizona.
California and Oregon Railroad	Aug. 15, 1887	California.
Chicago, St. Paul, Minneapolis and Omaha Railway.	Aug. 17, 1887	Wisconsin—except lands selected on account of main line from Hudson to Superior City, and branch to Bayfield.
Dalles Military Road	Aug. 15, 1887	Oregon.
Flint and Pere Marquette Railroad	Aug. 15, 1887	Michigan.
Florida Railway and Navigation	Aug. 15, 1887	Florida.
Gulf and Ship Island Railroad.....	Aug. 15, 1887	Mississippi.
Marquette, Houghton and Ontonagon Railroad.	Aug. 15, 1887	Michigan—upper peninsula.

APPENDIX A.—*Statement showing names of roads, &c.*—Continued.

NAME OF ROAD.	DATE OF ORDER.	LOCATION OF LANDS.
Missouri, Kansas and Texas Railway.....	Aug. 17, 1887	Kansas.
Mobile and Girard Railroad.....	Aug. 15, 1887	Alabama.
New Orleans Pacific Railway.....	Aug. 15, 1887	Louisiana.
Northern Pacific Railroad.....	Aug. 15, 1887	Wisconsin, Minnesota, Dakota, Montana, Idaho, Washington, and Oregon.
Oregon and California Railroad	Aug. 15, 1887	Oregon.
Oregon Central Wagon Road.....	Aug. 15, 1887	Oregon.
Pensacola and Atlantic Railroad.....	Aug. 15, 1887	Florida.
St. Louis, Iron Mountain and Southern Railway.	Aug. 15, 1887	Missouri and Arkansas.
St. Paul and Duluth Railroad.....	Aug. 15, 1887	Minnesota.
Southern Pacific Railroad.....	Aug. 15, 1887	California.
Tennessee and Coosa Railroad.....	Aug. 15, 1887	Alabama.
Vicksburg and Meridian Railroad	Aug. 15, 1887	Mississippi.
Vicksburg, Shreveport and Pacific Railroad.	Aug. 15, 1887	Louisiana.
Wisconsin Central Railroad.....	Aug. 15, 1887	Wisconsin.
Wisconsin Farm Mortgage	Aug. 17, 1887	Wisconsin.

APPENDIX B.

Statement showing land districts in which restored lands are situated.

STATE.	CITY OR TOWN.	STATE.	CITY OR TOWN.
Alabama	Huntsville.	Minnesota.....	Crookston.
Arizona	Montgomery.		Duluth.
Arkansas.....	Prescott.		Fergus Falls.
	Camden.		St. Cloud.
	Dardanelle.		Taylor's Falls.
	Harrison.	Mississippi	Jackson.
	Little Rock.	Missouri	Ironton.
California	Independence.	Montana	Bozeman.
	Los Angeles.		Helena.
	Marysville.		Miles City.
	Sacramento.	New Mexico.....	Las Cruces.
	San Francisco.		Santa Fé.
	Shasta.	Oregon.....	Lakeview.
	Stockton.		Le Grande.
	Visalia.		Oregon City.
Dakota	Bismarck.		Roseburg.
	Fargo.		The Dalles.
Florida	Gainesville.	Washington.....	North Yakima.
Idaho	Coenr d'Alene.		Olympia.
	Lewiston.		Spokane Falls.
Kansas	Independence.		Vancouver.
	Salina.		Walla Walla.
	Topeka.	Wisconsin.....	Ashland.
Louisiana	Natchitoches.		Eau Claire.
	New Orleans.		Falls St. Croix.
Michigan	East Saginaw.		La Crosse.
	Marquette.		Wausau.
	Reed City.		

*HOMESTEAD ENTRY—DEVISEE—ACT OF MAY 14, 1880.***TOBIAS BECKNER.**

The act of May 14, 1880, enlarged the homestead right so that settlement before survey was duly protected, and it is accordingly held that where a homestead settler dies prior to survey the right of entry inures to his devisee.

Acting Secretary Muldrow to Commissioner Sparks, September 8, 1887.

In 1875 one Martin Holbrook established his residence upon a certain tract of land in Yakima county, Washington Territory. He cultivated and improved the same extensively, placing thereon a house twenty by thirty feet, a barn forty by sixty feet, granaries, corrals, and the out-buildings, fences, well, etc., to the value of at least three thousand dollars. On the 14th of March, 1882, said Holbrook died, leaving a will, dated January 23, 1882, wherein he bequeathed all his property, both real and personal, to Tobias Beckner, who was by the proper court (as appears by the records and copies of records on file in the case) appointed executor of the estate. After Holbrook's death and until the present time, Beckner continued to cultivate said tracts, as shown by numerous affidavits of record.

On May 26, 1885, township plat of survey was filed. Sixteen days thereafter—to wit, June 11, 1885—said Tobias Beckner filed homestead application No. 392 at said land office at North Yakima for said tract; the government survey having shown the same to be the S. $\frac{1}{2}$ of the S. $\frac{1}{2}$ of Sec. 36, T. 7 N., R. 20 E., North Yakima land district, Washington Territory. The homestead application reads:

Application No. 392.—I, Tobias Beckner, legal heir of Martin Holbrook, deceased, of Yakima county, Washington Territory, do hereby apply to enter, etc.

The accompanying affidavit reads:

I, Tobias Beckner, legal heir of Martin Holbrook, deceased, of Yakima county, Washington Territory, having filed my application No. 392, for an entry under section No. 2289, Revised Statutes of the United States, do solemnly swear, that Martin Holbrook, deceased, was a native-born citizen of the United States, over the age of twenty-one years, prior to his settlement of said land described, etc.

The local officers at North Yakima transmitted the papers in the above entry, together with the other returns for the month of June, 1885, to your office, which thereupon instructed them, November 19, 1885:

“The entry by Beckner was unauthorized under the law, and is therefore held for cancellation.”

Thereupon Beckner appeals to the Department, upon the grounds, substantially, that your decision denies to a legal devisee the exercise of rights conferred by law, the exercise of which is necessary to protect the property left by such decedent; that decedent was prevented from acquiring title to the tract in question not by any negligence on his part, but by reason of the failure of the government to survey said lands, for

which decedent's heirs ought not to suffer; that said decision is contrary to the intent and spirit of section 2291, R. S., providing for the acquisition of title under the homestead law by heirs and devisees; and is contrary to the principle of law which allows every man to devise his property by will.

The second section of the homestead act of May 20, 1862, (Sec. 2291 R. S.), provides that:

No certificate, however, shall be given; or patent issued therefor, until the expiration of five years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry or if he be dead, his widow; or in case of her death, his heirs or devisee; or in case of a widow making such entry, her heirs or devisee, in case of her death, proves by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, except as provided in section twenty-two hundred and eighty-eight, and that he, she, or they, will bear true allegiance to the government of the United States; then, in such case, he, she, or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law.

Under this act the entry was the initiation of the homestead right, and that right attached only from date of entry.

In the case of the Southern Pacific Railroad Company *v.* Lopez, (3 L. D., 130), Secretary Teller, commenting upon the act of May 14, 1880, said "Prior to the passage of the act, the only lawful initiation of a homestead claim, was by an entry or filing (except in cases coming under section 2294 R. S.), and there was no right of homestead upon unsurveyed land." This had been the uniform construction of the act of May 20, 1862.

The provision of the act that if the person making the entry dies, his widow, heirs, or devisees may perfect said entry, clearly shows that it was the intention of Congress to confer upon the widow, heirs and devisees respectively, all the rights that the entrymen died possessed of as against the government; and as no right under the homestead act of May 20, 1862, could be initiated or acquired except by entry, no right could inure to the widow, heirs, or devisees, under the homestead act by virtue of settlement of their decedent upon the public land without entry.

The act of May 14, 1880, changed the homestead law in this important feature, by providing that a homestead claim to land, could be initiated by settlement, and therefore might be made on unsurveyed as well as surveyed lands.

That act provides:

That any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application

and perfect his original entry in the United States Land Office as is now allowed to settlers under the pre-emption laws to put their claims on record, and his right shall date back to the date of settlement, the same as if he settled under the pre-emption laws.

In his decision in the case of the Southern Pacific Railroad Company *v.* Lopez above cited, Secretary Teller said; "This act introduced several new features into the homestead law, and among others, the initiation of a homestead claim by settlement, whether the land is surveyed or unsurveyed."

These two acts relating to the same subject matter, and to the same class of persons, are to be construed in *pari materia*, and considered together as explanatory of each other.

The act of May 14, 1880, was an enabling or enlarging statute, remedial in its nature, granting larger powers, rights and privileges to the settler, than was embraced in the original act. The sole purpose and object of the third section of said act, was to provide for the initiation of a homestead right by settlement, whether upon surveyed or unsurveyed lands; and the settler is protected in this inchoate right against every one else except the government.

Premising that the section of the homestead act of 1862, as contained in section 2291, Revised Statutes—providing that the widow, heirs or devisee may perfect the entry of a deceased entryman—was intended to confer upon said beneficiaries, all the right the entryman may have initiated or acquired while in life, it would seem to follow as a necessary conclusion, that whatever rights or privileges were conferred upon the settler by the act of May 14, 1880, would also inure to the benefit of his widow, heirs or devisees, in the order and manner as provided in the original act. This is in harmony with the general principle of the land laws on this subject, with respect to all other entries.

In timber culture entries the law provides that, in case of the death of the entryman "his heirs, or legal representatives" may perfect the entry.

The pre-emption act of March 3, 1843 (2269 R. S.) declares that: "Where a party entitled to claim the benefits of the pre-emption laws dies before consummating his claim, by filing in due time all the papers essential to the establishment of the same, it shall be competent for the executor or administrator of the estate of such party, or one of his heirs, to file the necessary papers to complete the same."

The right of the executor or administrator to complete the title of a deceased pre-emption claimant, came before the land office in the case of John Reddington (2 C. L. O., 91). In this case it was alleged that there were no heirs, and consequently no entry of the alleged claim could be allowed, but Commissioner Burdett said: "This clause is specific, and gives to the executor, administrator, or any one of the heirs the absolute right to *complete* the necessary proceedings for the acquisition of the title."

After stating that the subsequent proviso requiring the entry to be made in the name of the heirs, does not restrict in any manner the operation of the section, he continues: "It does not devolve upon the Land Department the duty of inquiring whether or not the party deceased has in fact left any heirs, and the question is not material." This decision was affirmed by the Department.

The broad underlying principle that controls the question is—that when a person initiates any right in compliance with, and by authority of the public land laws, and dies before completing or perfecting that right, it will not escheat and revert to the government, but inure to those on whom the law and natural justice cast a man's property, and the fruits of his labor after his death. The principle was recognized in the case of *Townsend's heirs v. Spellman* (2 L. D., 77). In this case Townsend made application to enter under the homestead law, which was rejected because of Spellman's prior entry. Subsequently Spellman abandoned the land, and Townsend died.

The question presented was whether or not his heirs are entitled to any right under section 2291, which provides for a certificate of entry and patent to "the person *making such entry*; or if he be dead his widow; or, if in case of her death, his heirs, or devisee." Secretary Teller held that: Townsend's application to enter was equivalent to actual entry, in respect to his rights, and that having died without perfecting the entry, his heirs were entitled to perfect *the entry he initiated*.

To hold that the beneficiaries of a deceased homestead claimant can only succeed to his rights after entry made, would have excluded the heirs of this claimant, except by the doctrine of relation, and it was upon this principle that their right depended; and this right relating back to the initial act of the deceased claimant, they were held entitled to make *entry of the land*.

It is upon the doctrine of relation solely that this decision is based, and that doctrine applies with greater force in the case of a homestead settler upon unsurveyed land, who has lived upon the land for a longer period than is required by law, making extensive and valuable improvements thereon, and who dies before being able to make entry, by reason of the delay in making survey; because the act of May 14, 1880, declares that: "He shall be allowed the same time to file his homestead application as is now allowed to settlers under the pre-emption laws to put their claims on record, *and his right shall relate back to the date of settlement*, the same as if he settled under the pre-emption laws."

So also in the case of *Winters v. Jordan*, in which it appeared that Winters made application to enter under the homestead law, which was rejected. A few days after making the application he died, bequeathing to John C. Ward "all of his property both real and personal, of every kind and nature." It was held by Commissioner McFarland that Winters—had he lived—would have been entitled to the tract involved; and inasmuch as he made personal application therefor he was competent to devise his right to the land (2 L. D., 85).

I am of the opinion that Beckner succeeded to the right of Holbrook to make entry of said tract, and if otherwise qualified, may perfect the same as devisee of said Holbrook.

For the reasons herein set forth, I reverse your said decision.

HOMESTEAD AND PRE-EMPTION FINAL PROOF.

HENRY D. FRUIT.

The word "district" as employed in the acts of March 3, 1887, and June 9, 1880, means judicial district, and not land district.

Acting Secretary Muldrow to Henry D. Fruit, September 9, 1887.

I am in receipt of your communication of the 26th ultimo, calling attention to the letter of the Commissioner of the General Land Office of April 1, 1885, to W. J. Mooney, Alga, Dakota Territory, wherein he defines the word "District"—as employed in the acts of March 3, 1877 (19 Stat., 403) and June 9, 1880 (21 Stat., 169) providing for pre-emption and homestead final proofs—to mean "judicial district," and not "land district."

I see no objection to the letter of the Commissioner, because, considering the language and purpose of the act, it will admit of no other construction. The act provides that such proof may be made "before the judge or, in his absence, before the clerk of any court of record of the county and State, or district and Territory, in which the lauds are situated."

The judge and the clerk referred to are officials of a court of record, of and for a judicial district, and not a land district.

The purpose of the act is to permit a person to make proof either before the register and receiver of the proper land office, or before the judge or in his absence the clerk of any court of record of the county or district in which the land is situated.

The fact that the land may be embraced within several judicial districts does not affect the question, because the proof may be made before the judge or in his absence the clerk of the court for either of the districts: Provided that it be made in the county in which the lands are situated, or if that be an unorganized county, then in the county next adjacent.

PRE-EMPTION—JOINT ENTRY—IMPROVEMENTS.

STITELER v. SAMPSON.

The right of joint entry is accorded where settlers prior to survey have placed improvements on the same legal subdivision, and the law does not prescribe the amount or character of the improvements necessary to warrant such entry.

Acting Secretary Muldrow to Commissioner Sparks, September 10, 1887.

I have considered the case of William O. Stiteler v. William Sampson, as presented by the appeal of the former from the decision of your

office, dated February 3, 1886, holding for cancellation his pre-emption declaratory statement No. 116, as to the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 20, T. 49 N., R. 9 W., filed July 9, 1885, in the Gunnison land office, Colorado, upon which he alleged settlement December 11, 1882.

The record shows that on July 9, 1885, said Sampson filed in said office his pre-emption declaratory statement No. 118, for certain tracts, including said quarter-quarter section, alleging settlement thereon July 1, 1883.

The township plat of survey was filed in the local land office on July 2, 1884.

Sampson gave due notice of his intention to make proof and payment for the land claimed by him, and upon the application of Stiteler a hearing was had to determine the rights of the parties to the quarter-quarter section common to both filings. Both parties appeared at the hearing and submitted testimony. From the evidence submitted the local land officers found that both parties had valuable improvements upon the land in controversy prior to the governmental survey thereof, and they recommended that a joint entry should be allowed. From this action both parties appealed, and your office held that the evidence failed to show that said contestant had any improvements upon said tract prior to survey, and hence, a joint entry could not be allowed.

It is quite evident that section 2274 of the Revised Statutes, providing for joint entries, can only apply where, in the language of the law, "settlements have been made upon agricultural public lands of the United States prior to the survey thereof, and it has been or shall be ascertained, after the public surveys have been extended over such lands, that two or more settlers *have improvements* upon the same legal subdivision, it shall be lawful for such settlers to make joint entry of their lands at the local land office."

In the case at bar, the evidence shows that the contestant claimed prior to survey a portion of the tract in dispute, and built upon said quarter-quarter section a small house, which was used by the town of Montrose as a "pest-house." But your office held that "this can hardly be considered such an improvement of the land as is contemplated by the pre-emption law." The law does not prescribe the amount or kind of improvements required to be placed on a tract in order to warrant a joint entry thereof. It matters not that the house when erected was to be used as a pest house by the town. The erection of the house and the clearing of a half acre of the land constitute an improvement, and the fact that the house was subsequently destroyed can not possibly make any difference in the case. The improvements of each party upon this particular forty were meager, but, as the parties had improvements upon other tracts of land included in their filings, there does not appear to be any good reason why a joint entry should not be allowed.

The decision of your office is modified accordingly.

PRACTICE—NOTICE OF DECISION.

ATLANTIC & PAC. R. R. CO. *v.* HOWARD.

In the absence of proof to the contrary, it will be presumed that notice sent by mail from the General Land Office to non-residents was received at the expiration of fifteen days from date of mailing.

Acting Secretary Muldrow to Commissioner Sparks, September 8, 1887.

The Atlantic and Pacific Railroad Company has filed an informal application for certiorari in the above stated case, accompanied by an appeal and specification of errors, from your decision of April 14, 1887, rejecting the claim of the company to the S. $\frac{1}{2}$ of Lot 2, SW. $\frac{1}{4}$ of Sec. 31, T. 32, R. 26, Springfield, Missouri.

The application and appeal papers filed therewith show that your decision was rendered in the above case April 14, 1887, and that appeal from said decision was filed in the local office at Springfield, Missouri, July 16, 1887, having been mailed to the local officers that day.

Although it is alleged that the appeal was filed "within sixty days allowed for appeal," there is nothing in the papers before me to verify it, or to show when the notice was received. On the contrary, it is shown by the papers presented with this application that the appeal was not filed within the sixty days allowed for appeal.

In the absence of proof to the contrary, it will be presumed that notice sent by mail from the General Land Office to non-residents was received at the expiration of fifteen days from date of mailing (Rule 97).

Applying this presumption to the case now under consideration, and it being a rule of the General Land Office to mail all notices on the same day that the notice appears to have been signed, it is shown that this appeal was not filed until after the expiration of seventy-eight days from date of notice.

As it does not appear from this application and the accompanying papers that the Commissioner erred in rejecting the appeal, the relief prayed for can not be granted, and you will so notify the company.

HOMESTEAD—RESIDENCE—FINAL PROOF.LAWRENCE *v.* PHILLIPS.

The right to submit final proof and receive patent in case of an entry made by a single woman is not defeated or abridged by her marriage and removal from the land after fulfilling the statutory period of residence.

Acting Secretary Muldrow to Commissioner Sparks, September 9, 1887.

I have considered the case of Thomas E. Lawrence *v.* Mary E. Phillips, involving homestead entry No. 11,302, made by the latter Decem-

ber 16, 1879, for the E. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 33, T. 3 S., R. 17 W., Little Rock district, Arkansas.

Contest was initiated May 16, and hearing had June 27, 1885. There is little controversy as to the facts, the only question being whether the course pursued by defendant constituted an abandonment of the tract.

It appears that defendant was residing on the tract at the date of entry, and continued to reside thereon for nearly two years and a half. Her father having previously died, the illness of her mother rendered it necessary for defendant to remove from the tract in order to take care of her.

Defendant, at some time during her mother's fatal illness, made arrangements with Lawrence, now the contestant, whereby Lawrence was to live in the house upon the premises and take charge of them during her necessary absence. The testimony of defendant to this effect is corroborated by witness Taylor, who at Lawrence's request made application to Miss Phillips to enter into such an arrangement; also by witness Roark, who says:

Lawrence informed me some time in 1882 (the same day he moved on defendant's homestead) that his agreement with Mary E. Phillips was that he was to take care of the house and look after the things in general, and furnish Mary E. Phillips a home with him; this he was to do for and in consideration of the use of the house on the homestead. The defendant made her home with the complainant part of the time.

Lawrence, the defendant, himself testifies to substantially the same thing. He says: "After I moved on the place I told the defendant that she could have a home there with me as long as she wanted it."

Neither the date of the above agreement, nor that of the death of defendant's mother, which occurred after six months' illness from cancer, is clearly set forth; but it appears that the latter took place about three years after defendant had made entry of the tract. During her mother's illness, defendant visited the tract twice; and after her mother's death she lived in the house upon her homestead, with Lawrence and his family, for a season—how long does not definitely appear from the record. Witness Roark (cited *supra*) says: "The defendant made her home with the complainant a part of the time." The remainder of the time—after her mother's death—she staid with an aunt who resided within about a mile of the tract in controversy. While staying there, defendant testifies—

I often went upon my homestead and did such work as rebuilding fence, and exercised authority over the homestead—gathering the fruit from my orchard and disposing of the same.

One reason why the defendant lived more at her aunt's and less upon her own claim is disclosed by her testimony: "Mrs. Lawrence, the complainant's wife, forbid my going on my homestead."

Contestant does not deny that defendant was forbidden the premises, but on cross-examination says: "I never told the defendant that she

should not come on the place." As bearing upon this branch of the subject, witness McNally testifies :

The defendant employed me to haul some fruit from the place in controversy. . . . She agreed to give me half the fruit, and I sold it and kept two dollars. I only hauled one load. Plaintiff was absent from the place when we got the fruit. Plaintiff and I had an affray the next day after I got the fruit.

In a case of forfeiture, the burden of proof is on the attacking party, and there must be a preponderating weight of proof in order to justify such forfeiture. In the case at bar, taking into consideration the sickness of defendant's mother, the vague and inconclusive character of the proof as to the dates and the length of the periods of her presence or absence until the time when she was forbidden the premises, the fact that her said absences were in part at least the result of her having been forbidden to come upon the place, and that the local officers, who heard the testimony of the witnesses, and had an opportunity to observe their manner and bearing while upon the stand, find that "she has done as well as she could do under the circumstances," I do not think it has been proven that defendant "wholly abandoned said tract and changed her residence therefrom."

Furthermore, it appears clear that the plaintiff has not carried out in good faith the agreement made with defendant, to let her board with him in return for his services in keeping a general oversight of the premises during her absence, but has violated said contract, by preventing her coming upon the premises and removing the products thereof, and that at a time when he had no particle of right upon the tract, but was himself a trespasser. As was said by this Department in the case of *Johnson v. Johnson* (4 L. D., 158), "under no circumstances will it permit itself knowingly to be made an instrument to further the fraudulent designs of an individual who is seeking to acquire title to land to which he has no right."

It is contended, however, that the marriage of defendant before making final proof, and living with her husband away from the homestead, was a change of residence and abandonment of the land.

Section 2291 of the Revised Statutes provides :

No certificate, however, shall be given, or patent issued therefor, until the expiration of five years from the date of such entry ; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry, or if he be dead his widow, or in case of her death his heirs or devisee, or in case of a widow making such entry, her heirs or devisee in case of her death, proves by two credible witnesses that he, she or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, except as provided in section 2288, and that he, she, or they will bear true allegiance to the government of the United States, then, in such case, he, she, or they, if at that time citizens of the United States, shall be entitled to a patent as in other cases provided by law.

Under the homestead law a person having the proper qualification as to citizenship—being the head of a family or a single person of proper age, and not having previously exercised the homestead right—may be entitled to one hundred and sixty acres of the public land, by making homestead entry thereof, followed by a *bona fide* settlement and residence for the period of five years.

It is therefore settlement and residence on the tract, by a qualified person, for the period prescribed by the statute, that determines the right to the land: and a subsequent disqualification will not bar the entryman of the right to submit proof of an entry made while qualified, and where all the requirements of the law had been fulfilled prior to such disqualification, provided that at the time of making such proof he is a citizen of the United States and has not alienated the land.

The defendant made her homestead entry December 16, 1879, and the period of five years immediately succeeding that date expired December 16, 1884. During all this time she was a qualified entryman, and maintained a continuous residence for five years—the greater part of the time being actually present on the land, and the remainder of the time having a constructive residence thereon. She had therefore by that time fulfilled the law and entitled herself to the homestead. Her subsequent marriage, five months thereafter, did not disqualify her from proving up: nor did a subsequent change of residence forfeit her right to the homestead. Section 2297 of the Revised Statutes provides that—

If at any time after the filing of the affidavit as required by section 2290, and *before the expiration of the five years* mentioned in section 2291, it is proved, after due notice to the settler, to the satisfaction of the register of the land office, that the person having filed such affidavit has actually changed his residence or abandoned the land for more than six months at any time, then and in that event the land so entered shall revert to the government.

It seems clear from this section that residence upon the homestead is not required after the expiration of the five years, as a prerequisite of obtaining patent to the land: nor does a change of residence after that period forfeit a right already acquired. The express language of the law that the land shall revert to the government if the entryman actually changes his residence *before* the expiration of the five years, necessarily implies that a change of residence *after* the expiration of the five years will not cause it to revert.

From the record now before me, I am satisfied that there has been a sufficient compliance with the law as to settlement and residence for the full period of five years, and that the right of the defendant to submit proof thereof has not been forfeited or impaired by her subsequent marriage and change of residence.

The contest will be dismissed, and defendant will be allowed to make final proof.

RAILROAD GRANT—ACT OF MARCH 3, 1887—RULE OF MAY 23, 1887.

The act of March 3, 1887, is mandatory, and requires that there shall be no unnecessary delay in the matter of adjusting rights claimed under the various grants; and the revocation of certain indemnity withdrawals under the rules of May 23, 1887, was not intended to delay or suspend such adjustment.

Acting Secretary Muldrow to Commissioner Sparks, September 15, 1887.

In connection with the order of the Department of the 15th ultimo, revoking the orders of withdrawal of indemnity lands for the benefit of the Atlantic and Pacific Railroad Company, and restoring said lands to settlement, which said order of revocation was made applicable to other roads in decisions transmitted to your office, I desire to call your attention to the act of March 3, 1887 (24 Stat., 556) authorizing and directing the Secretary of the Interior to *immediately* adjust, in accordance with the decision of the supreme court, each of the railroad grants made by Congress to aid in the construction of railroads and heretofore unadjusted.

The act is mandatory, and to facilitate and accomplish the duty required by it, it is of the utmost importance that there shall be no unnecessary delay in passing upon and disposing of all matters submitted by the railroad companies pertaining to and in pursuance of their claimed rights under the grant.

In the order of revocation it was directed that the restoration of said lands to settlement should take effect immediately, but that filings and entries of the lands embraced therein should not be received until after giving notice by public advertisement for a period of thirty days—it being the intention of the order that as against actual settlement made after the issuance of the order of revocation, the order of the Department withdrawing the lands should no longer be an obstacle. The rights of the company and of settlers theretofore attaching to be decided according to the facts in each case.

It was not intended, however, by this order to suspend or delay the examination of lists then pending in your office. On the contrary, such lists as are now pending in your office and which have not been examined for approval should be taken up and disposed of immediately, and, if found to be legal and proper in all respects, they should be approved and forwarded to the Department for consideration and appropriate action. If such lists or any part thereof are disapproved by you, they should also be forwarded to the Department, with your reasons for such disapproval for action thereon. If any of the unapproved lists now pending in your office awaiting examination are proper selections, and the road is entitled to such selections, their rights should be determined at once, and not made to depend on a subsequent contest with a settler who may hereafter settle upon any tract of land embraced in said list, when the sole question which will finally determine the right of

the company to such tract may be decided by the Department before the lands are open to filings and entries.

Under the order above mentioned, the sole issue that can be made by a settler against the company, whose settlement was made after the order of revocation, is, whether the selection is a valid and proper selection. If such selection is a valid and proper selection, it will be approved to the company, and the application of the settler to file for or enter said land will be rejected.

It is therefore important that the work of the Department should not be unnecessarily increased by having to adjudicate the right in each individual case, when the right of the company as to the greater part, or all, of such selections may be determined before the application to file or enter could be received, and both the company and the settler saved the expenses and trouble of subsequent litigation.

I therefore direct that you proceed immediately, and with as much dispatch as possible, to examine and pass upon the lists of selections now pending in your office, and to forward them to the Department with your action thereon, it being the object of this order to dispose of as many of said lists as possible before the expiration of the thirty days provided for in the order of restoration, when filings and entries may be received.

Whatever rights the companies may have acquired, by reason of any action taken by them during the time and by virtue of such withdrawals, should not be jeopardized or rendered unavailable by any action or want of action on the part of the Department.

This work is to be considered *special*; and to the end, that the same may be expedited as much as possible you are directed to detail from the different divisions of your office such force as can be profitably employed thereon.

DESERT LAND ENTRY—DOUBLE MINIMUM LAND.

Where the initial entry of double minimum land was made prior to the promulgation of the circular of June 29, 1887, the entryman should be required to pay but one dollar and twenty-five cents per acre for the land so entered.

Acting Secretary Muldrow to Commissioner Sparks, September 15, 1887.

I am in receipt of your letter dated September 3rd, submitting for my consideration two question arising under the third section of the desert land circular of June 27, 1887 (5 L. D., 708), which provides as follows: "The price at which lands may be entered under the desert land act is the same as under the pre-emption law, viz: Single minimum lands at \$1.25 per acre, and double minimum lands at \$2.50. (See 2357 United States R. S.)

The questions propounded are, First, In cases where the initial entry had been made upon double minimum lands and the first payment,

(twenty-five cents per acre) paid prior to the promulgation of said circular, shall the entryman be required to pay the additional sum of \$2.25 per acre before receiving final certificate, or shall he be allowed to make final proof and receive final certificate upon the payment of \$1.00 only, as he would have been allowed to do prior to the promulgation of said circular; and second, In cases where entries have been made and final certificate for double minimum lands has been issued before the promulgation of said circular, should the entryman be required to pay an additional sum of \$1.25 per acre before receiving patent for the lands embraced in his entry.

You suggest that the said circular does not fix the price of said lands, but merely declares the price at which they have been fixed by law, and that the price of lands is not subject to departmental regulations; and the inference is drawn from your suggestions that in your opinion both questions should be answered in the affirmative. Section 16 of said circular provides; "Nothing herein will be construed to have a retroactive effect in cases where the official regulations of this Department in force at the date of entry were complied with."

It is true as you suggest that the circular does not fix the price of the lands, but that they are fixed by statute. It must be remembered, however, that the circular construes the statute authorizing desert land entries in connection with Sec. 2357 R. S., and finds that the true intent and meaning of these laws is that the even sections which are desert lands within railroad limits, shall be held to be double minimum in price. But it is simply a construction.

The desert land act itself speaks of all the lands subject to entry under its provisions as being rated at \$1.25, and the uniform construction of that act and the other laws *in pari materia* from the date of its passage, March 3, 1877, up until the adoption of the present circular, was that double minimum desert land should be entered at the same price as single minimum lands.

The making of an entry under the desert land law is a contract between the entryman and the United States, the entryman agreeing to reclaim the tract entered from its desert condition and to pay for the same at the government price, and the United States agreeing to give him a patent for said land after the performance of the conditions in the contract. As earnest money the entryman pays one fifth of the price of the land at the date of making his original entry. The remainder is to be paid when the contract is performed and satisfactory proof of such performance furnished. This contract, like all others is to be construed and enforced according to the sense in which the parties mutually understood it at the time it was made. (1 Chitty on Contracts, 104); and effect is to be given to it according to the law at the time it was made. (id., 130).

Now the former ruling of the Department which had been in existence from the date of the act until the date of the present circular, had,

while it existed the force and effect of law so far as rights acquired under it are concerned. It was a construction of the law by the head of the Department charged with the execution of it, and the law was administered according to this construction.

The entryman made his contract under the ruling then in force, relying upon this construction thus adopted, and the mutual intention of both parties was that the land should be paid for at the price of \$1.25 per acre. This was the law then, and the contract was made with special reference to it.

It makes no difference that the construction of the law has changed. For the sound and true rule is that if the contract when made was valid by the law as then interpreted and administered, its validity and obligation cannot be impaired by any subsequent decisions altering the construction of the law. *Rowan et al. v. Runnels* (5 How., 134), *Ohio Life Ins. and Trust Co., v. Debolt* (16 id., 427), *Gelpcke et al. v. City of Dubuque* (1 Wall., 175).

From the foregoing I am clearly of the opinion that where entry was made of double minimum desert land prior to the promulgation of the circular under consideration, the entryman should be required to pay but \$1.25 per acre for the land entered by him.

FINAL PROOF—OMISSION OF JURAT.

KATIE A. TOWEY.

The failure of the register to date and sign the jurat attached to the final proof should not defeat the consideration of said proof, it having been regularly submitted, sworn to before the register, and approved by the local office.

Acting Secretary Muldrow to Commissioner Sparks, September 17, 1887.

I have considered the appeal of Katie A. Towey, from your office decision of November 12, 1885, requiring her to make new publication, and furnish new proof under her pre-emption cash entry No. 1452 for the SW. $\frac{1}{4}$ of Sec. 12, T. 126 N., R. 61 W., Aberdeen, Dakota, land district.

Katie A. Towey filed her declaratory statement, November 13, 1882, alleging settlement, November 8th, and on May 12, 1883, offered final proof, which was approved by the local officers, and final certificate issued thereon. When the papers reached your office, it was discovered that the register had not filled up, or signed the jurat attached to the proofs, and on December 8, 1884, your office returned the papers to the local office, for completion of jurat.

The local officers, by letter of August 22, 1885, report that said proof was made before register Duncombe, who has since died, and transmit with their letter, the affidavits of claimant and one of her witnesses, stating that they signed and swore to said proof before S. W. Duncombe,

then register on the 12th day of May, 1883, and also stating, that Charles Reynolds, the other witness, also signed and swore to the said proof at the same time and place, and that said Reynolds afterwards left the Territory, and his place of residence is unknown to them.

On November 12, 1885, your office decision was made, in which it is said.

The proof submitted is void and of no effect without the signature of the officer before whom the same was made, being attached thereto, and you will notify the claimant that she will be required to make new publication, and furnish new proof.

From this decision claimant appealed. The claimant in this case had done all that was required of her to entitle her to patent for the land. She had given notice of her intention to make final proof, and at the time and place specified in said notice, she appeared, with two witnesses, whose statements, with her own were taken in proper form, and signed and sworn to by them. This was all she could do. She can not be held responsible for the omission of the register to sign the jurat.

That these parties did appear as stated, make their respective statements, and were sworn to them, does not, I think, admit of a doubt. The fact that the local officers endorsed on the proofs "approved", and issued final certificate thereon, is sufficient to show that all things necessary to be done by the claimant, had been done to their satisfaction. In addition to this is the positive affirmative statement, under oath of the claimant and one of her witnesses, (the failure to procure the statement of the other witness being satisfactorily explained) that all these things had been done.

To require the claimant in this case to make new publication and proofs, would subject her to considerable additional expense without fault or negligence on her part, and would be saying, in effect, that claimants are to be held responsible for any omission of the officers of the government to perform their duties. The injustice that might be done, if such a policy were adopted by the Department, is so apparent that I deem it unnecessary to discuss the question at length. The law requires simply that the Department shall be satisfied before issuing patent, that the claimant has complied with all of the requirements of the law, and it is not the policy of the Department to inflict upon the settler, who has in good faith done what was required by law, the hardship of additional expense, because of an irregularity in the papers, and especially when that irregularity is the result of the negligence of an officer of the government. To adhere to your ruling in this case, would be to inflict upon the claimant a hardship not justified by the facts and circumstances.

For the reasons herein set forth, your said office decision is reversed, and you are directed to receive said proofs, and to give to them the same consideration as they would have received if the register had completed the same by dating and signing the jurat.

PRIVATE CLAIM—COMPLETE FRENCH GRANT.

RODOLPHUS DUCROS.

Under the treaty of 1803, the United States acquired no title to land included within a complete French grant, and consequently could now convey none by patent. Section 2447 of the Revised Statutes authorizes the issuance of patent only in case of claims confirmed by statutory enactment, and where the confirmatory statute made no provision for patent.

Acting Secretary Muldrow to Commissioner Sparks, September 20, 1887.

The private land claim of Rodolphus Ducros is for section No. 11, consisting of lots 1 and 2 in T. 13 S., R. 13 E., and section No. 69 in T. 13 S., R. 14 E., containing, as shown by the record, altogether 2,483.40 acres, "in the former Southeastern District, east of the River Mississippi, State of Louisiana, according to plat of survey herewith, duly authenticated by the signature of the U. S. Surveyor-General for the State of Louisiana, on the 19th of June, 1885."

The register and receiver, under the act of February 27, 1813 (2 Stat., 807), entitled an act giving further time for registering claims, etc., acting as commissioner on claims, designated this claim as of the First Class, Species First.

The act of June 25, 1832, confirmed the claims of a number of small settlers upon the Bayou Terre aux Boeufs, which said claims interfered with the Ducros claim, and amounted in all to 1,864.24 acres.

December 20, 1860, the surveyor general of Louisiana transmitted to your office twenty-two pieces of scrip for eighty acres each, and one for 104.26 acres, under act of June 21, 1858, as indemnity therefor. April 12, 1873, your office refused to approve the said certificates of location, and your office decision was on March 2, 1874, duly sustained by the Department.

March 16, 1874, surveyor general of Louisiana transmitted two pieces of new scrip for 80 and 81.40 acres, respectively, as indemnity for loss sustained by reason of the superior conflicting claims of Francis Versaille and Silvano Veillon, which were found by your office letter of April 12, 1873, to have been located by the U. S. surveyor, prior to the winter of 1830-31, when the Ducros claim was surveyed. By your office letter of January 11, 1878, you returned the said two pieces of new scrip to the surveyor-general of Louisiana, duly authenticated.

Subsequent application was made for patent to the land embraced in the Ducros claim, and thereupon on September 14, 1885, the local office transmitted certificate No. 164, dated September 12, 1885, at New Orleans, for patent to be issued for 2,322 acres, the amount remaining after deducting said new scrip, to Rodolphus Ducros, his heirs and assigns.

December 17, 1885, you declined to issue patent as aforesaid, and the case is now before me on the appeal of the legal representatives of said Ducros.

It is urged by counsel for appellant that the claim of Ducros being based upon a complete French grant, recognized by the treaty of cession of 1803, is clearly confirmed by law, within the language of Section 2447 of Revised Statutes, and that patent should issue under the authority of said section. Counsel argue that claimants, who have rights to lands under a higher grade of confirmation, to wit, the treaty of 1803, should have at least the same privileges and benefits which are possessed by a lower grade, to wit, the act of Congress, and contend that in this regard the said section should be taken in its general and not in its restricted sense.

The report of the register and receiver, acting as commissioners under act of February, 1813, *supra*, dated January 20, 1816, found this claim to be of the First Class Species. First, i. e.: that it stands confirmed by law, and that it is founded on a complete title granted by the French government. American State Papers, Green's Ed., Vol. 3, p. 223. Subsequently, and in the same report, the said commissioners say :

Those claims which are found under species first of the first class, being founded on complete grants of former governments, we think good in themselves on general principles, and therefore require no confirmation by the government of the United States to give them validity.

The act of May 11, 1820 (3 Stat., 573), confirmed all claims recommended in the said report against any claim on the part of the United States.

Assuming the finding of the local officers, acting as commissioners, that the Ducros claim is based upon a complete French grant and therefore complete in itself to have been correct, it is evident that under the treaty of 1803 no estate in the land in question had ever vested in the United States and consequently patent therefrom could convey none. If, on the other hand, the said claim is not based upon a complete French grant, it should not be patented, being unconfirmed by law. Section 2447 of the Revised Statutes provides for the issue of patent for claims "heretofore confirmed by law," and for which "no provision has been made by the confirmatory statute" for such issue.

In the light of the foregoing, it seems clearly to have been the legislative intent to make statutory confirmation in this regard an essential to patent.

In the absence of such express authority, I concur in the ruling of your office letter rejecting the present application. Your decision is affirmed.

RAILROAD GRANT—SETTLEMENT RIGHTS.

BROWN v. CENTRAL PAC. R. R. CO.

The right acquired by settlement, in the absence of any claim of record, or otherwise, is confined to the limits of the quarter section within which the settlement is made.

A settlement right, existing at the date when the grant became effective, excepts the land covered thereby from the operation of the grant.

Acting Secretary Muldrow to Commissioner Sparks, September 22, 1887.

I have considered the case of Ralph I. Brown v. Central Pacific Railroad Company, as presented by the appeal of the latter from the decision of your office, dated August 27, 1885, rejecting its claim to the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 9, T. 14 N., R. 8 N., M. D. M., in the Sacramento land district, in the State of California.

The record shows that said land is within the limits of the grant to said company by act of Congress, approved July 1, 1862 (12 Stat., 489). The withdrawal of the odd numbered sections for the benefit of said company was ordered by your office letter, dated August 2, 1862, which was received at the local land office on September 12, same year.

Said decision states that "the map of definite location of the line of said company's road opposite said land, was filed in the office of the Secretary of the Interior October 27, 1866." It appears, however, from an inspection of the records of your office that the map of definite location of the road opposite said land was filed in this Department on March 26, 1864, although another map was filed, lapping back opposite the land in question on October 27, 1866.

It appears that the township plat of survey was filed in the local land office on June 10, 1875. On January 5, 1885, said Brown applied at the local land office to enter said land under the homestead laws, averring that said land was excepted from said grant and said withdrawal by reason of the occupancy of one S. W. Stockton, who was a qualified pre-emptor, and who resided upon a portion of said land continuously from the month of March, 1866, to the end of said year. Said Brown also filed corroborative affidavits, alleging that "during the whole of the time elapsing from the fall of the year 1862 up to the spring of 1867," said Stockton resided continuously upon and cultivated a portion of said land.

A hearing was duly ordered, at which both parties appeared, and upon the evidence submitted the local land officers found that said Stockton settled upon said land in 1862; that he was a duly qualified pre-emptor; that he continued to reside upon said land until 1868 or 1869; that his improvements consisted of his dwelling house and a portion of the land enclosed and cultivated; that said Stockton never filed for said land, or asserted any claim to any portion thereof other than that upon which his house and homestead improvements were situated;

that his residence and improvements were confined to the west half "of the northeast quarter of said section 9"; that in the absence of any evidence showing that said Stockton ever asserted possession or used for any purpose any part of the land other than that occupied by his house and improvements, said settlement and occupation could only except the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of said Sec. 9, and that the claim of the company for that tract should be rejected and Brown should be allowed to enter the same under the homestead laws.

The evidence fails to show that said Stockton occupied or claimed any portion of said SE. $\frac{1}{4}$ and hence his occupancy of the north forty of the NE. $\frac{1}{4}$, in the absence of any claim of record, or otherwise, can not be held to have excepted any other tract than the NE. $\frac{1}{4}$ from said grant. *Elliott v. Noel* (4 L. D., 73).

The construction given in the decision appealed from would reserve, with equal propriety, from the operation of said grant and said withdrawal, sixteen quarter quarter sections, or six hundred and forty acres of land, because of the occupancy by a qualified pre-emptor of one quarter-quarter section, although no claim had ever been filed for the same, or any other tracts in connection therewith.

A careful consideration of the whole record shows that the decision of your office is erroneous, and must be reversed. The entryman will be allowed to enter the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of said section nine.

CONFLICTING SETTLEMENT RIGHTS—EQUITY.

CARLSON *v.* KRIES.

Conflicting rights acquired in good faith by settlement or filing, are properly determined by the equities of the case, where the legal rights of the parties are equal.

Acting Secretary Muldrow to Commissioner Sparks, September 22, 1887.

I have considered the case of Charles J. Carlson *v.* Christian Kries involving the respective rights of the parties to the S $\frac{1}{2}$ of the NE. $\frac{1}{4}$ Sec. 31, T. 101, R. 57, Mitchell, Dakota land district, appealed by Kries from the decision of your office, dated December 24, 1885, holding his filing, so far as it affects said tract, for cancellation and allowing the filing of Carlson on said tract to remain intact. The following facts are satisfactorily shown in the case.

On November 7, 1881 Patrick McNamara made a homestead entry which included the east half of the above described tract. The improvements made by McNamara on said homestead entry were confined to a forty acre tract in Sec. 30—same town and range above given.

On December 1, 1881, Kries made a pre-emption filing on the said S. $\frac{1}{2}$, and on the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of the same section.

On May 23, 1882, McNamara sold his improvements and relinquishment of said entry to Carlson, who on that day took formal possession, and dug a few stones and laid about ten of them as a foundation of a house on the east half of the tract in controversy. On the 26th of the

same month, Carlson filed the McNamara relinquishment, and made pre-emption filing on the entire NE. $\frac{1}{4}$ of said section 31, thus leaving out the forty acre tract in section 30, on which McNamara's house—which was all of his improvement—was situated.

Carlson and McNamara testify that at the time Carlson filed on the land in controversy, the books of the local office showed it to be vacant. Each of the parties seem to be actual settlers, who in good faith are cultivating and improving their respective claims. The improvements of Kries, are on that part of his claim which is not in dispute, while those of Carlson, are principally on the east forty of the tract.

The weight of the evidence in the opinion of the Department, shows that Kries had, prior to Carlson's filing, to wit, on or about March 18, 1882, in good faith established a residence on his claim, which has not since been abandoned; and this being so found, his right to the west half of the tract in dispute is clear, as it was not covered by McNamara's prior homestead entry, and as Kries lost none of his rights by the unsuccessful attempt which he made in 1883 to have his filing changed from the disputed tract to the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of said section.

Kries could acquire no rights to the east half of the tract in controversy so long as the homestead entry of McNamara remained of record, for that tract was then segregated from the public domain. Before that entry was canceled, Carlson had made actual settlement upon that particular forty-acre tract, which settlement he afterwards followed up by residence and the making of valuable improvements. Kries has no improvements upon this particular forty acre tract. So that even admitting that the right of Kries under his filing would attach to this forty upon the cancellation of the McNamara homestead entry (which is all that can be claimed for him in any event), he would have no greater *legal* right to this tract than Carlson who was an actual settler on the tract when said entry was canceled.

Admitting then for the sake of the inquiry that as regards their legal rights the parties hereto stand equal, I think it must be conceded that Carlson's equities are superior to those of Kries; for as before stated, Carlson's improvements all made in good faith are upon this particular forty.

Following the familiar maxim that where the law is equal the equity will prevail, I decide that Carlson shall have the east half of the tract in dispute, the particular forty upon which his improvements are situated and upon which he is residing.

For the reasons given, the decision of your office as to the east half of the tract in controversy is concurred in, and as to the west half is reversed.

In accordance with this decision, Carlson's filing on the west half of the disputed tract will be canceled, and Kries allowed to enter the same, together with the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of said Sec. 31, for which you have approved his proof; and the Kries filing on the east half of said tract will be canceled.

HOMESTEAD—COMMUTATION PROOF—RESIDENCE.

HENRY H. HARRIS.*

Poverty accepted as a satisfactory excuse for temporary absences from the land, there being no indications of bad faith on the part of the settler.

Acting Secretary Muldrow to Commissioner Sparks, June 3, 1887.

On the 1st of October, 1883, Henry H. Harris made homestead entry No. 5542 of the SE. $\frac{1}{4}$ of Sec. 31, T. 118 N., R. 77 W., Huron, Dakota, and on the 25th of June, 1884, he commuted the same to cash entry No. 9658.

His proof then offered showed that he was a single man, twenty-nine years of age; that his improvements consisted of a sod house twelve by fourteen feet, plastered, a frame barn fourteen by sixteen feet, nine and a half acres of breaking, all valued at \$150; that he built his house May 25, 1883, and established his residence there same date; and that he had cultivated two acres of oats and half an acre of vegetables one season. In answer to the question: "For what period or periods have you been absent from the homestead since making settlement, and for what purpose; and if temporarily absent, did your family reside upon and cultivate the land during such absence?" he replied: "Four months at different times for the purpose of making a living."

In a special affidavit executed June 19, 1885, before a notary public for Rock county, Wisconsin, and submitted in response to your letter "C," dated March 24, 1885, claimant says, that he settled upon said land May, 22, 1883, by breaking two acres and commencing to build his house; that he completed said house and established his actual residence therein June 25, and was on the land continuously from that date until August 1, when he went to Spink county, Dakota, in search of employment; that he returned to his land September 1, remaining until October 1, when he went to Redfield, Dakota, in search of employment, returning to his land November 15, and remained there until January 15, 1884; that he then went to the eastern part of the Territory in search of employment and remained until March 1, when he returned to his claim and was there continuously thereafter until the date of final proof June 25, 1884; that said land lies at a distance of thirty-eight miles from any railroad, by reason of which the country afforded no work during the winter for a mechanic or laboring man; that during the whole period covered by his entry he was a poor man with no means aside from what he earned by daily labor; that being unable to procure work in the county in which he lived during the winter of 1883-'84, he was compelled to go to the eastern part of the Territory in search of employment to support himself; that during his absences from said land he was at work for wages; and that he took

* Omitted from Volume V.

said land for a home and has acted in entire good faith in all his proceedings relative thereto.

Upon receipt of this affidavit, your office considered the case as it then stood, and on the 16th of October, 1885, rejected said proof and held the homestead and cash entries for cancellation. Appeal has been taken, and the case has been considered.

In the opinion of the Department the decision appealed from can not be sustained. Out of a period of thirteen months intervening between the date of settlement and the date of final proof claimant was actually on the land nine. The various absences aggregating about four months appear to be satisfactorily accounted for, and I see no indications of bad faith in the premises.

The decision appealed from is reversed, and the entry will proceed to patent.

MOTION FOR REHEARING.

HUNTER *v.* ORR.

Motion for new trial filed in the above entitled case (see 5 L. D., 8) overruled by Acting Secretary Muldrow September 22, 1887.

FINAL PROOF—DEFECTIVE NOTICE.

ALFRED SHERLOCK.

Where final proof has been submitted and certificate issued thereon, and said proof is subsequently found defective in the essentials as to notice, new advertisement and new proof will be required showing due compliance with law up to the date when the certificate issued.

If the proof submitted is found insufficient upon its merits and new proof is allowed, it must show compliance with the requirements of the law up to the date when made.

Acting Secretary Muldrow to Commissioner Sparks, October 11, 1887.

Alfred Sherlock appeals from your office decision dated December 16, 1885, rejecting his final pre-emption proof for the NE. $\frac{1}{4}$ of Sec. 24, T. 142 N., R. 52 W., Fargo, Dakota.

This proof satisfactory in other respects, was rejected because it was not made in accordance with the published notice required by the act of March 3, 1879 (20 Stat., 472).

The notice after specifying the names of the witnesses whose testimony would be used goes on to state:

"The testimony of witnesses to be taken before S. W. Hall a notary public of Arthur, Cass County, Dakota Territory, and claimant at United States Land Office, Fargo, Dakota Territory on the 20th of March A. D., 1884."

As a matter of fact the testimony of witnesses was taken before said S. W. Hall March "18," 1884; and that of claimant was taken before the local office at Fargo March "28," 1884.

The proof was accepted by the local office and payment was received.

The act of March 3, 1879, clearly intended that the time and place of making final proof should be stated in the notice, and also that the proof must be made at said time and place. Albert L. Lent (6 L. D., 110). And the regulations approved by the Department February 21, 1887 (5 id., 426) are clear and explicit on these points. Rules 1 and 2 of said regulations clearly apply to the case under consideration—Rule 1, to the testimony of the witnesses, and Rule 2, to the testimony of claimant himself. There must, then, under these rules be "new advertisement and new proof" entire.

The difficulty in the majority of cases of this kind lies in the fact that the local officers failed to do their duty when they accepted the proof. They were not careful enough to see that the requirements of the law had been met. The entrymen, naturally would not be expected to know the law better than the local officers whose business it was to be well informed in the law under which they acted, and to enforce its requirements.

In many cases, no doubt, the entryman in good faith having complied with the law in the matter of residence, improvement and cultivation, and having, as he believed, submitted proof of such compliance, and that proof having been accepted by the local officers, very naturally concluded that the land embraced in his entry was his own private property and proceeded to act upon such conclusion. In many such cases entrymen in good faith relying upon the well known rule announced in *Myers v. Croft* (13 Wall., 291), that an entryman who has complied with the requirements of the law under which he claimed up to the issuance of final certificate is entitled to sell, have disposed of their land to *bona fide* purchasers for a valuable consideration. Their proof afterwards comes before the General Land Office and the Department, and is found to be defective in some essential particular or particulars.

To require new proof in such cases showing compliance with the law up to the time it is made, will be to require something of the entrymen which they are not in a condition to perform. As was said in the case of Clara Morrison (6 L. D., 28) neither ought this to be required if as a matter of fact the law had been complied with when the former proof was offered.

It would seem therefore that an equitable and just rule in cases of this kind would be to require new advertisement and new proof showing compliance with the law up to the date when the final certificate was issued. Such rule is in harmony with the regulations aforesaid and the cases cited. This case will take that course, and the decision appealed from is so modified.

This rule will be held to apply only to cases in which the proof is defective merely in the essentials as to notice.

In cases where the proof *upon its merits* is insufficient; that is to say where it shows that the requirements of the law under which the entry was made have not been lived up to, the new proof must show compliance with the law up to the date it is made.

PRICE OF LAND—TEXAS PACIFIC GRANT.

GEORGE T. CLARK.

Following the withdrawal made on the map of general route filed by the Texas Pacific the even sections therein were raised to double minimum, and such action although without express statutory authority is apparently recognized in the act forfeiting said grant, and determines the price of the restored lands.

Acting Secretary Muldrow to Commissioner Sparks, September 23, 1887.

This is an appeal from your office decision, dated March 22, 1886, rejecting the final pre-emption proof of George T. Clark, for the SW. $\frac{1}{4}$ of Sec. 3, T. 14 S., R. 1 W., S. B. M., Los Angeles, California.

At the time of offering proof Clark tendered \$1.25 per acre for the land in dispute, but his proof and tender of payment were rejected by the local officers, for the reason that they considered the land double minimum in price. Your office decision was based upon this same hypothesis, and this is the only material question in the case as now presented.

This tract is within the limits of a withdrawal made October 15, 1871, upon map of general route filed in September, 1871, in pursuance of the 12th section of the act of Congress approved March 3, 1871 (16 Stat., 573), granting lands to the Texas Pacific Railroad Company.

Immediately upon this withdrawal all the even sections within its limits were by the General Land Office raised to double minimum in price.

Under the provisions of the granting act the right of the road to its granted lands attached, and said lands were to become designated upon definite location of the road. The road was never definitely located, and was never built by this company through any part of the public domain.

February 28, 1885, Congress passed an act (23 Stat., 337), declaring :

That all lands *granted* to the Texas Pacific Railroad Company be, and they are hereby, declared forfeited, and the whole of said lands restored to the public domain and made subject to disposal under the general laws of the United States, as though said grant had never been made : *Provided*, That the price of the lands so forfeited and restored shall be the same as heretofore fixed for the even sections within said grant.

It is somewhat difficult to arrive at the true intent and meaning of the proviso in the forfeiting act, when it is considered in the light of the well known facts in the case, and the act making the grant. For

it is observed that nowhere in terms does the granting act give any authority to the land department to raise the price of any lands along the line of the proposed railroad. If such authority exists, it must be found in the general statute of March 3, 1853 (10 Stat. 244). This act provides:

That the pre-emption laws of the United States, as they now exist, be and they are hereby extended over the alternate reserved sections of public lands along the lines of all the railroads in the United States, wherever public lands have been or may be granted by acts of Congress; and that it shall be the privilege of the persons residing on any of said reserved lands to pay for the same in soldiers' bounty land warrants, estimated at one dollar and twenty-five cents per acre, or in gold and silver, or both together, in preference to any other person, and at any time before the same shall be offered at public auction: *Provided*, That no person shall be entitled to the benefit of this act who has not settled and improved, and shall not settle and improve, such lands prior to the final allotment of the alternate sections to such railroads by the General Land Office: *And provided further*, That the price to be paid shall in all cases be two dollars and fifty cents per acre, or such other minimum price as is now fixed by law, or may be fixed upon lands hereafter granted, etc.

Now it would seem that under this act the alternate reserved sections are not raised in price until after "the final allotment of the alternate sections" to the railroad—in other words, until after the right of the road to the particular sections granted has attached by definite location of the road, as is generally the case, or otherwise under the provisions of the particular granting acts.

Under the provisions of the granting act under consideration the right of the road to its granted land was to attach upon definite location. It was then that the line of the road became fixed and certain, and the particular sections of land granted as well as the alternate reserved sections were designated and determined. So that were the question before me as an original proposition, I should have grave doubts as to the authority of the land department to raise the price of any lands along the line of this railroad prior to definite location. But whether such authority really existed or not, certain it is that the lands in the even sections within the withdrawal on general route *were* raised to \$2.50 per acre by the General Land Office soon after the filing of the map of general route by the company; and the only way to harmonize the proviso in the forfeiting act with the granting act, and make the two apparently consistent, is to say that Congress, when it passed the act of forfeiture, had reference to the lands within said withdrawal on general route. When said act of forfeiture refers to "lands granted to the Texas Pacific Railroad Company," it must mean the alternate odd sections within said withdrawal on general route or else be meaningless; and for the same reason the "even sections" referred to in said proviso must be the even sections within the said withdrawal.

For the foregoing reasons, the decision appealed from is affirmed.

SENECA INDIAN LANDS.

The application on behalf of the Seneca Indians for the sale of a certain section sixteen in Seneca county Ohio, under the provisions of the treaty of February 28, 1831, must be denied, as the government has fully performed its trust under said treaty and accounted for the proceeds of the land sold in accordance therewith.

Acting Secretary Muldrow to Commissioner Sparks, September 28, 1887.

I am in receipt of your letter of May 28th last, transmitting, with accompanying papers, the application of Langman and Stidham, as agents of the Seneca Indians, to have section 16, T. 3 N., R. 16 E., Seneca county, Ohio, offered and sold as provided for by the treaty of February 28, 1831 (7 Stat., 348).

The treaty referred to is the treaty by which the Seneca Indians ceded to the United States, to be sold for the benefit of said Indians, a quantity of land amounting to 40,000 acres, reserved to said Indians by the treaties of September 29, 1817 (7 Stat., 160), and September 17, 1818 (7 Stat., 178).

Subsequent to this cession, to wit, in 1836, the State of Ohio sold the sixteenth section referred to in the application of the Seneca Indians, as land appropriated by Congress for the support of schools, and executed and delivered to the purchasers deeds therefor, although the State had previously and while said section 16 was in a state of reservation selected the W. $\frac{1}{2}$ of Section 12, T. 3 N., R. 16 E., as part indemnity for said section 16, which selection was approved January 12, 1827.

After the sale above referred to and prior to 1840, the State authorities applied to the General Land Office for permission to select the sixteenth section, and to release the W. $\frac{1}{2}$ of section 12, selected as part indemnity, but the Commissioner declined to grant the request, upon the ground that the Attorney General had given an opinion that under the stipulation of the treaty of 1831 the section would have to be sold for the benefit of the Indians as other lands embraced in the cession, and they were notified that they would be allowed to select another half section to complete the quantity they were entitled to for said sixteenth section.

In 1845 the State also sold the W. $\frac{1}{2}$ of Sec. 12, which had been selected as indemnity for section 16, and both tracts were in possession of the vendees of the State.

Upon this state of facts, the Legislature of Ohio, in 1846, passed a resolution reciting that both tracts had been sold as land appropriated for the use of schools, and requesting Congress to confirm their title to section 16, and that the State might be allowed to pay for the W. $\frac{1}{2}$ of Sec. 12.

This resolution was referred from the Senate Committee on Private Land Claims to the Commissioner of the General Land Office, who again reported that the sixteenth section in question was by the treaty of

February 28, 1831, to be sold for the benefit of the Seneca Indians, and that the Attorney General had decided that it could not be set apart for the use of schools.

It does not appear that the question as to the rights of the Indians under treaty, or the right of the State to said section, had ever been submitted to the Attorney General, but the opinion referred to is the opinion of the Attorney General in the matter of the Choctaw Reservation, holding that "the reservations under the Choctaw treaty of 1830 might be located on the sections granted in the act of March 2, 1819, to Alabama for the use of schools, notwithstanding said act, for the reason that the United States could only grant subject to the Indian right of occupancy."

No further action was taken in this matter until July 21, 1874, when a letter was addressed to the auditor of the State of Ohio by the Commissioner, stating that the action of the State in disposing of said section for school purposes was illegal and that said section is subject to sale under the treaty of February 28, 1831. This view was concurred in by the Secretary of the Interior, who authorized the sale of said land, and the local officers were so instructed, but almost immediately thereafter they were directed to defer action in the matter until further instructed, and no further action was afterwards taken relative to the sale of said section.

It does not appear that any action heretofore taken, relative to the sale of this section by the State, was induced by the application of the Indians claiming any interest in the same, but this is the first time, so far as the record shows, that they have asserted any claim to said section under either of the treaties made with said Indians. If they have any interest in said section, the sale of it by the State for school purposes becomes important; but if they have no interest in it, the validity of said sale by the State is not necessary to be determined in disposing of this application.

By the treaty of September 29, 1817, the United States granted by patent in fee simple to the chiefs of the Seneca tribe of Indians, and their successors in office, for the use of persons named in a schedule annexed to said treaty—

"A tract of land to contain 30,000 acres, beginning on the Sandusky river, at the lower corner of said section hereinafter granted to William Spicer, thence down the said river, on the east side, with the meanders thereof at high water mark to a point east of the mouth of Wolf Creek, thence and from the beginning east, *so far that a north line will include the quantity of 30,000 acres aforesaid.*"

This was a grant of a specific quantity of lands, to wit, 30,000 acres, and not a grant of lands within certain defined boundaries. There was but one well defined boundary, and that was the Sandusky river on the west. The indefinite south-east and north lines were to extend, "so far that a north line will include the quantity of 30,000 acres."

September 17, 1818, a supplementary treaty was made with said Indians, in which it was stipulated that the several tracts of land described in the treaty of 1817 should not be granted for the use of the individuals of said tribe, but shall be held by them in the same manner as reservations have been heretofore held, and said treaty increased the grant 10,000 acres, to be laid off on the east of the Sandusky river, and south of their reservation of 30,000 acres of land.

The land reserved to the Seneca Indians, thus increased to 40,000 acres, was laid off according to the treaty by boundaries supposed to contain only the quantity of 40,000 acres, but it embraced in fact 41,006.81 acres.

You state that "this excess is accounted for from the fact that the west boundary of the reserve was the Sandusky river, and while the reserve was undoubtedly laid out to include just 40,000 acres, as nearly as irregular meander lines would permit, the precise area embraced in the survey could not be ascertained until the reserve had been sectionized and the acres of fractional subdivision calculated."

This error in running the lines to include a greater quantity of land than was granted could not increase the grant, and although the fixing of boundaries supposed to contain only 40,000 acres may have reserved the entire tract within said boundaries from other appropriation until specific tracts, required to make up the amount of 40,000 acres, had been definitely ascertained, yet when the full quantity of 40,000 acres had been sold from said reservation, and the proceeds accounted for to the Indians, the excess would be released from such reservation and be subject to other disposal.

By treaty of February 28, 1831, the Seneca Indians ceded to the United States the lands granted to them by the treaties of 1817 and 1818, and the United States therein stipulated to sell said lands for the benefit of said Indians.

The tracts ceded by this treaty are described as, "a tract of land containing 30,000 acres . . . beginning on the Sandusky river at the lower corner of the section granted to William Spicer, thence down the river on the east side with the meanders thereof at high water mark to a point east of the mouth of Wolf Creek, thence and from the beginning east so far that a north line will include the quantity of 30,000 acres," and "10,000 acres of land to be laid off on the east side of the Sandusky river, adjoining the south side of their reservation, of 30,000 acres, which begins on the Sandusky river, at the lower corner of William Spicer's section, and excluding therefrom the said William Spicer's section, making in the whole of this cession 40,000 acres."

In the 8th article of said treaty it is stipulated that, "The United States will expose to public sale to the highest bidders at such time and in such manner as the President may direct *the tracts of land herein ceded by the Seneca Indians.*"

The land ceded by the Seneca Indians was a tract of land containing 40,000 acres and no more, and it was this tract or quantity of land that the United States stipulated to sell for the benefit of said Indians.

This was the extent of the cession, and when that quantity of land was sold by the government and the proceeds accounted for to the Indians, the trust was executed, and the government was under no further obligation to sell for their benefit any other land, although the boundaries referred to in the treaties may have embraced a greater quantity than 40,000 acres.

In accordance with the provisions of the treaty the United States as trustee disposed of all the lands embraced within said boundaries, except the section now in question.

On December 31, 1835, the account was adjusted between the United States and the Seneca Indians for the sale of these lands, showing that the government had sold under the provisions of the treaty 40,366.81 acres, and accounted for the proceeds, making 366.81 acres in excess of the 40,000 stipulated to be reserved and sold for the benefit of said Indians.

Considering that the government has fully discharged its trust under the treaty, and fully accounted for the proceeds of every acre of land to which the Seneca Indians were entitled under the several treaties, the application to have said tract sold under the provisions of the treaty of 1831 is refused.

The sole question to be considered under the application is, whether the Seneca Indians have any claim to this land under the treaty of 1831, and that being decided adversely to them, the question as to the validity of the sale of this lot for school purposes by the State of Ohio is not necessary to be considered herein.

RESTORED RAILROAD LANDS—FORFEITURE.

SIoux CITY & ST. PAUL R. R. Co.

(On Review.)

The departmental decision opening to entry the lands certified back to the government by the State of Iowa was not a declaration of forfeiture, but a declaration that said lands had been inadvertently and illegally patented to said State and should be restored to the public domain.

Acting Secretary Muldrow to Commissioner Sparks, September 30, 1887.

I have before me a protest filed by E. F. Drake and A. H. Wilder, as trustees for certain holders of bonds secured by mortgage on lands granted to aid in building the Sioux City and St. Paul Railroad in Iowa. Said protest is made against that portion of decision of this Department rendered July 26, 1887, (6 L. D., 47), which opened to settle-

ment and entry 26,017.33 acres of lands which were involved in that decision.

Said lands which had been patented to the State of Iowa for the benefit of the railroad company, were by the Governor of the State pursuant to act of its legislature certified back to the United States, and were by this Department accepted for the government and thrown open to settlement and entry as are other public lands of the United States.

Protestants ask a reconsideration and revocation of the order contained in said departmental decision which opens to entry the lands reconveyed by the State of Iowa as above stated. Their contention in substance is that said order amounts to a declaration of forfeiture, the right to make which does not rest in this Department, but is vested in Congress which made the grant.

The order opening the lands to settlement and entry was in my judgment a logical sequence and necessary result from the conclusion reached in the decision containing the order. It was there found that the lands had been mistakenly and erroneously patented to the State, and that the company has no legal claim to them or any of them under the grant of 1864, or any other law. If this be true there is no declaration of forfeiture, for that would imply that they passed by the grant and were taken from the company notwithstanding said grant.

The State recognizing the fact that the lands had been erroneously patented and that the company was not entitled to them under the grant, refrained from certifying them to the company, and certified them back to the government which accepted them and threw them open to settlement and entry as already stated.

These lands were patented to the State as indemnity. The granting act provides for indemnity for lands found to have been lost from the grant in place at the date of definite location.

The decision objected to found, (and I see no reason to change the views therein expressed,) that the lands in question never had any basis upon which to rest as indemnity. Consequently there was no declaration of forfeiture—only a declaration that the lands had been inadvertently and illegally patented to the State. In other words they were patented without any authority under the granting act. Such title as the patents to the State conveyed having been reconveyed to and accepted by the government, the lands are, it seems to me, clearly public lands and as such subject to disposal as any other public lands.

The application for revocation of the order throwing them open to settlement and entry must be and, it is hereby denied.

*SPECULATIVE CONTEST—PREFERENCE RIGHT OF ENTRY.**DAYTON v. DAYTON.*

No preference right of entry can be acquired through a contest which is shown by the evidence to have not been prosecuted in good faith.

Acting Secretary Muldrow to Commissioner Sparks, October 1, 1887.

I have before me the case of James R. Dayton *v.* Lyman C. Dayton, involving the SE. $\frac{1}{4}$ of Sec. 14, T. 123, R. 64 W., Aberdeen, Dakota, on appeal from your decision of May 4, 1886, wherein the claim of both parties was rejected.

This land was embraced within the timber culture entry of Andrew L. Scott, and became the subject of controversy herein through each of the parties endeavoring to secure the land by separate contests directed against said entry.

Prior to May 11, 1882, both of the Daytons had made several efforts toward securing the cancellation of the Scott entry on contest, alleging relinquishment and non-compliance with law on the part of Scott, and superior rights as against each other, each claiming to have purchased the relinquishment of Scott.

On the date last named a hearing was had at which both of the parties were present, the local office deciding as the result thereof that the entry of Scott should be canceled, as he had in fact executed a relinquishment of the entry, and failed to comply with the law, but the preference right of the contestants was left undetermined.

October 10, 1883, when the case came before your office, Scott's entry was held for cancellation, but it was decided that neither of the Daytons was entitled to the preference right of entry.

August 8, 1884, on appeal to the Department, the decision of your office was modified, and Lyman C. Dayton was accorded the preference right of entry under his contest, and he accordingly entered the land under the homestead law September 25, 1884.

On March 9, 1885, having an application for review under consideration, the Department ordered a rehearing in order to ascertain the respective rights of said contestants. The rehearing was deemed necessary as it was strongly urged that the record then before the Department was incomplete, and various improvements as well as rights acquired by residence, were alleged in the way of establishing equitable claims to the land, and showing the good faith of the parties. Under this order hearing was duly had ending August 20, 1885, the local office holding that "neither James R. Dayton nor Lyman C. Dayton have any valid right either in law or equity to this tract of land; that all their pretended and assumed rights either of record or otherwise, should be canceled and set aside, and the land held open to the first legal applicant."

May 4, 1886, your office affirmed the decision of the local office, finding in effect that the contests initiated by both the Daytonos were speculative and hence of no effect, and from this decision the case is now here on appeal.

The sole question at issue is, which, if either of the Daytonos, has acquired the preference right of entry, by virtue of having successfully contested the Scott entry. The departmental decision of August 8, 1884, held the first contests filed by the Daytonos of no effect because not accompanied by application to enter the land, and found in favor of Lyman C. Dayton because he first applied for the land. It was, however, alleged by James R. Dayton that he in fact filed the first application, and that through no fault of his the said application had been placed among the papers in another contest which he had begun against the timber-culture entry of one Hause, covering an adjacent tract in section 23. Lyman C. Dayton also claimed to have made an application prior to the one disclosed by the record. In the order for rehearing express directions were given with respect to the allegations concerning priority of application in order that such matter might be satisfactorily determined.

The day originally set for the rehearing was June 16, 1885, but on the application of Lyman C. Dayton the case was continued until July 13, 1885. On that day the parties appeared and James R. Dayton submitted his evidence, but Lyman C. Dayton again asked for a continuance, on the ground of absent witnesses and incomplete records. The case was thereupon continued until August 20, 1885. In their opinion the register and receiver say in speaking of this continuance:

For two days Lyman C. Dayton had interposed objection after objection, filed affidavits for continuances, failed to attend the hearing promptly and in a most gross and unprofessional manner used every effort known to block the proceedings in this case; but with a determination on our part to get in all the testimony in this case, if possible, we granted this motion for another continuance.

On August 20th, Lyman C. Dayton did not appear, and the local officers say with respect to said default: "We held the case open until four o'clock P. M. No appearance having been made by Lyman C. Dayton or his counsel except an affidavit received by mail asking for another continuance which we refused to grant, and the case was accordingly closed."

It is now urged that this ruling was error and that no opportunity has been given Lyman C. Dayton to present his case.

Motions for continuance are addressed to the sound discretion of the local officers, subject only to review for the abuse of such discretion. *United States v. Connors et al.* (5 L. D., 647). From the record of the proceedings no error is apparent in the ruling complained of. Two continuances had already been accorded Lyman C. Dayton prior to August 20th. He alleged as the reason for his non-appearance on that day that his wife was suddenly taken ill, and so seriously, that his presence with

her was absolutely necessary, and he appears to have telegraphed such alleged fact to the local officers to save the default.

But the applications of Lyman C. Dayton filed August 14th and 17th, for commissions to take certain depositions, warranted the local officers in regarding the last motion for continuance as not made in good faith, for it was thus made apparent that he did not expect to be ready for trial on the 20th. Such fact, together with the previous record made by said Dayton in the matter of delaying investigation, was sufficient ground for denying the last motion for continuance.

From the evidence submitted the local office correctly found that James R. Dayton filed application for this land under the timber culture law on November 1, 1881, but that subsequently said Dayton exhausted his right to make timber culture entry by entering the Hause tract on January 21, 1882. To explain the apparent want of good faith on his part, James R. Dayton alleges that he intended from the first to take the Scott tract as a homestead, and the Hause tract as a tree claim, but that through a mistake of his attorney, the applications as made out and filed were the reverse of his intention; that when he discovered the said error he asked leave to amend his application for the Scott tract, so that the same should be consistent with his original intention.

The evidence, however, as to said alleged application for amendment, cannot be accepted as conclusive or satisfactory, being confined substantially to the testimony of James R. Dayton and his attorneys and not corroborated by the record, while various conflicting statements have been made by the said Dayton and his attorneys as to the time when the alleged error was discovered and action taken thereunder.

Now the departmental decision of August 8, 1884, favorable to Lyman C. Dayton, rested on the finding that he had, on April 18, 1882, filed the first application for the land as basis of his contest, but this finding in the light of the evidence submitted at the rehearing cannot stand, as it is apparent that James R. Dayton had in fact applied for the land November 1, 1881, though he subsequently became disqualified to take anything under said application.

As to the improvements and residence of said parties, it seems that at about the same time—in the spring of 1882—both of the Daytons erected houses on the land, that of Lyman C. Dayton being of a substantial character, while that of James R. Dayton was of little value and hardly habitable. Neither of the parties in fact established or maintained at any time a *bona fide* residence on the land. James R. Dayton lived in Aberdeen, and occasionally visited the land, while Lyman C. Dayton lived in Minneapolis and likewise paid occasional visits to the tract. Both your office and the local office held that neither party had in good faith ever had any residence on the land, and I agree with such finding.

The only consideration that could be given any residence or improvements during the time the Scott entry remained of record would be as

between the parties herein, for before the cancellation of said entry, no rights could be acquired by settlement and improvement as against the United States or the former claimant. *Geer v. Farrington* (4 L. D., 410). From the above it is obvious that neither party by his alleged residence or improvements established any equitable claim either as against each other or the government.

It appears from the evidence on the rehearing that James R. Dayton has made deeds to the Chicago, Milwaukee and St. Paul Railroad Company for the right of way across this land, and also for depot and station grounds as well as land for machine shops. This fact is to be noticed, for although said Dayton had no title to convey, his claim that he asserts is the right of entry under the homestead law which only authorizes such conveyance as are specified in section 2288 R. S., and that section while permitting the conveyance of land for right of way purposes, does not include land for station grounds and machine shops.

The history of this contest, or rather series of contests leaves no doubt in my mind but that your decision must be affirmed. Scott sold his relinquishment of the tract to one of the Daytons, though to which one is not clear. Subsequently each attempted to secure the exclusive benefit of said relinquishment, the original instrument not being in the possession of either. The land in controversy is very valuable, lying adjacent to the city of Aberdeen, and as the parties hereto were mutually involved in serious business complications prior to this contest, the proceedings herein from the first have been characterized by the evident intent of each party to take any advantage of the other possible.

That Lyman C. Dayton's contest is not in good faith is apparent from the fact that although first begun in June 1881, he has apparently never been quite ready to proceed therewith, the record showing four continuances granted on his application, while his present appeal alleges error in overruling his last motion for further time. Again, when by the decision of October 10, 1883, your office held both contests inoperative, Mrs. Nell, Lyman C. Dayton's mother, applied to enter the land and being refused, he acted as her attorney in prosecuting an appeal, though at such time still urging his own suit before the Department.

The showing under James R. Dayton's contest is no better. Though the first applicant for the land, he subsequently disqualified himself to make entry, and while endeavoring to show that his priority was, through his alleged application to amend, not lost, makes so many contradictory statements as to leave the whole matter of amendment in doubt to say the least, while his deeds to the railroad company evince a disposition to control the land and the benefits incident thereto irrespective of statutory right or authority.

Finally: It is apparent that the contest is the result of a disagreement arising between the Daytons over the control of the Scott relinquishment purchased and held for speculative purposes, and that nei-

ther of the parties hereto at any time has intended to take the land for *bona fide* settlement. The decision of your office is therefore affirmed. The entry of Lyman C. Dayton will be canceled, and the appeal of James R. Dayton dismissed.

With the papers in the case appears the application of the city of Aberdeen to intervene and show its superior right to this land or a portion of the same. This application was denied by the local office, and your decision affirmed such action on the ground that the proceedings herein were of special character and when terminated would not prevent the city from asserting its claim before the Land Department.

It is alleged that the city was incorporated April 20, 1882, and that its right dates therefrom, and it appears that since the decision of your office cancelling the Scott entry applications to enter the land have been uniformly rejected by the local office on the ground that said land is within the incorporated limits of Aberdeen.

In order therefore that the claim now and heretofore asserted by the city of Aberdeen may be presented in due form, you will direct that no entries of the land be allowed until such time as the right of said city thereto may be duly determined, and to such end notice should be duly given the attorneys appearing for said city, requiring the presentation of the city's claim under the townsite laws within sixty days after notice of this decision.

PRE-EMPTION—SECOND FILING.

KATE WALSH.

A second filing allowed where the first was illegal for want of settlement, and the allegations therein with respect to settlement were made in good faith.

Acting Secretary Muldrow to Commissioner Sparks, October 1, 1887.

Kate Walsh filed pre-emption declaratory statement No. 5007 for NW. $\frac{1}{4}$ of Sec. 22, T. 153 N., R. 57 W., Grand Forks, Dakota, on the 14th of April, 1883, alleging settlement April 2d, same year.

April 18, same year, Herschel Hulick filed pre-emption declaratory statement No. 5121 for same tract, alleging settlement March 28, 1883, and on the 28th of September, 1883, he made final proof and received final certificate No. 8215 therefor.

May 19, 1885, the local officers at Grand Forks transmitted the application of Miss Walsh to file a second pre-emption declaratory statement for certain lands in the Devils Lake land district, and recommended its allowance. In this application it is alleged substantially as follows:

That prior to filing said declaratory statement she employed a man to go upon said land and build a house for her, in order that her settlement might be made before filing. A few days thereafter, believing

that the person so employed had done as he had agreed to do, she filed for said land as aforesaid. Before going to said land to establish her residence, she learned that the individual employed to build her house had failed to perform his contract, and also that in the meantime said Hulick had filed for the same land, which filing he afterwards perfected to entry. Applicant never sold or relinquished said filing, or realized any benefit from it. She was wholly ignorant of the land laws, and in the matter of her claim was guided by the advice of friends, who informed her that after Hulick filed for said land her rights therein ceased, and that it would be useless for her to attempt to hold it by residence. Therefore she never established residence on the tract at all. She accordingly asked that her said filing might be declared to be no bar to her filing for the SE. $\frac{1}{4}$ of Sec. 28, T. 157 N., R. 73 W., Devils Lake, Dakota, upon which latter tract she proposed to settle and make her home.

By decision, dated October 1, 1885, you rejected said application on the ground that the statute restricted the settler to a "single exercise of the pre-emption privilege."

From this decision applicant appealed, setting up substantially the same state of facts as had been alleged in her said application, with this additional fact that she has since made settlement upon the tract applied for, has made valuable improvements thereon and is now living there.

It would seem from the foregoing, that applicant's first filing, made in ignorance of the law, was illegal, for the reason that she had not yet made settlement upon the land filed for. Nor did she ever settle on said land, for the reason, as she alleges, that she ascertained that Hulick's rights thereto were superior to hers.

Now, had she as a matter of fact made settlement at the date alleged in her declaratory statement, she could not, even then, have defeated the claim of Hulick, for his settlement was prior to that date; and a second filing, under such circumstances, would have been allowed her. *Goist v. Bottum* (5 L. D., 643), and authorities cited.

The question then narrows itself to simply this: Does her erroneous allegation of settlement in her said declaratory statement place her in a worse position than she would have been in had said allegation been strictly in accord with the actual facts in the case? Under the circumstances of this case, I think not. The most that can be said against her is, that she was mistaken as to the meaning and import of the term *settlement*. She evidently understood that term to mean nothing more than the building of a house or the placing of improvements upon the land by some other person under the direction of the settler. It was in that sense that she used the term in her declaratory statement, believing at that time that the individual she had employed to build her house had performed his part of the contract.

Her ignorance of the land laws has brought about the whole trouble. And while I recognize the full force of the maxim "*Ignorantia legis neminem excusat*," yet I think that a party's ignorance of the effect of certain acts can always be taken into consideration in determining the question of his good faith. In this case I have no doubt that the applicant was perfectly honest and straightforward in all she did. She believed she was acting in accordance with the law under which she was seeking to acquire title to a tract of public land. She therefore acted in good faith.

Her application to file a declaratory statement for the lands specified in the Devil's Lake land district is granted, subject to any valid adverse rights attaching prior to her settlement thereon.

Your decision is reversed.

COMMUTATION PROOF—RESIDENCE.

MARY E. BALLARD.

The fact of commutation does not in all cases defeat the plea of poverty when offered as an excuse for absence from the land or want of improvement.

The case of *Whitcomb v. Boos* cited and distinguished.

Acting Secretary Muldrow to Commissioner Sparks, October 3, 1887.

I have before me the appeal of Mary E. Ballard from your office decision holding for cancellation her cash entry, No. 13,816 (commuting homestead entry No. 25,627) for the SW. $\frac{1}{4}$ of Sec. 28, T. 108, R. 66, Mitchell district, Dakota.

The facts shown by the record which you considered, are these: Mrs. Ballard, a widow with two sons, one thirteen and the other nine years of age, made entry August 1, 1883, and had a frame timber house ten by twelve feet with shingle roof, built on the tract about November 20, 1883; she established her actual residence there with her sons on the 15th day of January, and remained continuously on the land until about February 1, 1884, when she absented herself "for the purpose of earning money with which to support herself and her children and to buy seed and get breaking done on said land"; she returned to her homestead on the 10th of June, 1884, and remained continuously thereon with their children until the 27th day of November, 1884, on which day she went to a neighbor's house (with her children) to take care of that neighbor's cow and pigs during his absence from home, staying there three weeks; she then returned to the homestead and remained there until February 20, 1885, when she ran out of fuel and money and was obliged to leave the tract to obtain employment, her eldest boy getting a place on board wages and the other being left with a friend while she herself "worked out to earn some more money"; on the 14th day of April, 1885, she returned to the tract, on which she continued, not

merely until she made final proof, on the 22d day of that month, but thereafter, she having been still living there—with her children on the 12th day of December, 1885, the date of the supplemental affidavit filed by her—which affidavit contained the latest information considered by your office and concluded with the following declaration, made as of that date: "I am living on said land now with my children; 'it is all the home I have got.'"

The improvement done before December 12, 1885, comprised the building of the house already mentioned, the picking of stones from the land, the digging of a well, the breaking of five acres, etc.; of an estimated value of \$100. In this connection the claimant swears as follows:

I inquired among my neighbors in June, 1884, to get some one to do some breaking for me; but they were all so busy with their own work that I could get none broken till it was too late to put in any crop. In April, 1885, I hired five acres broken on the said tract and had it planted to corn and potatoes, but the gophers took up all the corn, so I had that part of the five acres sowed to flax and raised a crop of flax and potatoes on the breaking in 1885.

Your office held that Mrs. Ballard having voluntarily commuted, her excuse for absence and the meagerness of improvement, that she was so poor as to be under the necessity of "working out" to earn money with which to support herself and family, and to pay for improving and cultivating the claim cannot be accepted, and that, accordingly, her entry must be canceled and the purchase money forfeited.

In this, under the circumstances of the case, I am of the opinion that your office erred. There is no conclusive presumption of law that an entryman who commutes cannot have been practically compelled, by the need to earn wages, to absent himself occasionally from his land after establishing his residence. Not only may the commuting money have been received after the time in question, or borrowed for the very purpose of commuting, and on the credit of the title so to be acquired but, even the claimant's own ownership all along of the sum of \$200, would not necessarily make inexcusable his taking the necessary steps to earn what he needed for other purposes, so as to be able to devote *that* sum to the early acquisition of the title. Such a commutation by a poor man, may well be the one condition to his enabling himself to continue permanently upon his land, by procuring, on the credit of his title, the funds needed to improve the claim into one capable of supporting him.

Where accordingly, the mere fact of commutation furnishes the *only* apparent argument against the plea of poverty as an excuse for absence or failure to improve, so that the excuse would have been allowed had the case been one of ordinary final proof without commutation,—in such a case, I say, the excuse ought to be accepted, notwithstanding commutation. The case of *Whitcomb v. Boos* (5 L. D., 448) went no farther than to hold that, *under the circumstances of that case*, the alleged pov-

erty of the entryman "tended rather than otherwise to strengthen the suspicion of bad faith on his part."

In the present case I think that a *bona fide* compliance with the law has been sufficiently shown. Proof was not offered until more than fifteen months after residence was established; claimant and her children were actually upon the land considerably over half that period, and amply excused their absences; finally, they were still living there on December 12, 1885, some eight months after commutation. The entry ought clearly to be passed to patent.

Your office decision is therefore reversed.

RAILROAD GRANT—SETTLEMENT RIGHTS.

UNION PAC. R. R. CO. v. SIMMONS.

A settlement right, sufficient under the pre-emption law for the maintenance of a claim, existing at the date when the grant became effective, defeats the operation thereof, though such right was subsequently abandoned without legal assertion.

Acting Secretary Muldrow to Commissioner Sparks, October 4, 1887.

The land involved in this case is the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 25, T. 14 N., R. 70 W., Cheyenne, Wyoming, and is embraced within the limits of the grant to the Union Pacific Railway Company by act of Congress approved July 1, 1862, (12 Stat., 439), as enlarged by the act of July 2, 1864 (13 id., 356).

By decision dated February 20, 1886, your office rejected the claim of the railroad company to said tracts, and allowed the application of Anen Simmons to make homestead entry of the same. An appeal from said decision brings the case here.

The map of definite location of that part of the road opposite this land was filed in your office January 6, 1868. The township plat was filed in the local office April 15, 1873.

February 26, 1885, Anen Simmons's application to enter said tracts under the homestead law was rejected by the local officers because they considered the land as belonging to the railroad company. Simmons having alleged that said tracts were excepted from the grant by reason of the settlement thereon of one Newton Bond existing prior to, and at the date of, the definite location of the road, by letter "F" dated July 15, 1885, you ordered a hearing, which after due notice was had September 7, 1885, both parties being represented thereat.

The evidence in the case has been given a very careful consideration here, and the following facts are found.

Some time in 1867, Newton Bond settled and built a house upon what turned out to be the line between section twenty-five, township and range

aforesaid, and section thirty, T. 14, N., R. 69 W. He cultivated a few acres of land on said section thirty, and had some other improvements on a portion of said section 25—the exact location of which is not given, but which from the circumstances of the case are believed to have been upon the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ thereof. Bond resided there until in 1876, long after the definite location of the road.

Shortly after the plat of T. 14, R. 69, was filed in 1871, Bond filed pre-emption declaratory statement for the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 30, T. and R. last aforesaid, for which he received final certificate January 25, 1873, prior to the date when the plat of the township in which the lands in question are situated, was filed. He never filed for any of the lands in said section twenty-five, for the reason as he states that he discovered when the lands were surveyed, that said last section was railroad land.

It is in evidence that when Bond settled there he intended to take one hundred and sixty acres of land. This one hundred and sixty included the forty he afterwards pre-empted, and three other forties in said section twenty five. Which three forties the evidence fails to show.

The finding of your office on this subject is to the effect that his pre-emption claim in 1868, when the rights of the road attached embraced not only the forty he afterwards pre-empted, but also the four forties in controversy—in all two hundred acres. Such finding cannot be approved. Had Bond's settlement been made entirely upon what afterwards turned out to be the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of said Sec. 25, in the absence of any showing as to what his intentions were, the law would presume that his claim embraced the whole of said NE. $\frac{1}{4}$; but it would not presume that his claim embraced any land in the SE. $\frac{1}{4}$ of said section. *Brown v. Central Pacific R. R. Co.* (6 L. D., 151).

It is clear that he might have embraced in his claim the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of said section 25, for as already stated, his house was upon the section and township line, (one witness testifies it was wholly on section 25), and his improvements were partly on that forty. As to the other two forties in said section 25, it is not so clearly shown that were embraced in his claim at that time. Bond testifies generally that he intended to pre-empt the land in controversy. But as before shown he could not have intended to pre-empt *all* the land in controversy, for that would have made his claim embrace two hundred acres. I think it fair, therefore, to hold that he intended to claim the forty which he pre-empted in 1873, and the three forties specified in the NE. $\frac{1}{4}$ of said section 25, but *did not* claim the land in the odd section because he believed that land to be railroad land which he could not enter. It makes no difference that he did not enter said three forties. He had the right under the law, by virtue of his said settlement, to enter them, and such right is sufficient to defeat the claim of the railroad company.

I therefore find that the three forties in controversy in the NE. $\frac{1}{4}$ of said section 25 were excepted from the railroad grant, and that the record

in the present case does not show the forty in controversy in the SE. $\frac{1}{4}$ of said section 25, to have been so excepted.

The decision appealed from is modified accordingly.

PRACTICE—HEARINGS—RES JUDICATA.

SWARTZ *v.* BROWN.

No law, decision or regulation precludes the the General Land Office from acting on new evidence which comes to any pending case, or acquiring further information, by hearing or otherwise, at any time prior to patent.

Acting Secretary Muldrow to Commissioner Sparks, October 4, 1887.

I have before me the application, transmitted by your office August 31, 1887, of Litch J. Swartz for certification under Rules of Practice 83 and 84, of the record in the case of Samuel L. Brown *v.* Litch J. Swartz, involving the SW. $\frac{1}{4}$ of Sec. 17, T. 99, R. 60, Yankton, Dakota.

The applicant sets out that on the 8th of April, 1882, he made homestead entry for the tract described, and that on the 18th of June, 1884, he commuted the same to cash entry; that he still owns said land and resides near it; that Samuel L. Brown has applied to be allowed to contest his said cash entry No. 3487, which application to contest was allowed by your office under date of June 10, 1887, and a hearing was ordered thereon; that he filed an appeal from said decision of your office, which appeal your office declined to recognize. He thereupon makes this application for certiorari.

The grounds of his said petition are:

1. That the application to contest did not furnish sufficient ground for ordering a hearing because based on information and belief only.

2. Said final proof having been examined and approved by a former Commissioner it was not competent for the present Commissioner to order a hearing to test the validity of the entry. He cites decision of this Department in *United States v. Bayne*, (6 L. D., 4) as authority for his plea of *res judicata*.

The principle of that decision can have no application to this case as presented. That case discussed the authority of one Commissioner to change the final action of another, his predecessor, on the record as made.

No law, decision or regulation precludes your office from acting on new evidence which comes to any pending case, and further information by hearing or otherwise may be sought and acted upon at any time prior to the issuance of patent.

Robert Hall *et al.* (5 L. D., 174).

The application is denied.

OSAGE TRUST LANDS—MILITARY RESERVATION.

WENIE ET AL. v. FROST.*

That portion of the Fort Dodge military reservation which embraced Osage trust lands and was relinquished by the act of December 15, 1880, became subject, by such relinquishment, to disposal under the act of May 23, 1880, which requires the purchaser to be an actual settler and possess the qualifications of a pre-emptor.

The establishment of the military reservation upon these lands did not defeat or impair the trust imposed by the treaty of 1865, but operated as a postponement of its execution.

Acting Secretary Muldrow to Commissioner Sparks, October 4, 1887.

The tracts involved in this controversy are part of the Osage Indian trust and diminished reserve lands in Kansas, included in what was formerly the Fort Dodge military reservation.

By the second section of the treaty of September 29, 1865, between the United States and the tribe of the Great and Little Osage Indians, the said tribe ceded to the United States a tract of land twenty miles in width from north to south of the north side of their reservation, extending its entire length from east to west. By said section the land was declared to be held in trust for said Indians, to be surveyed and sold for their benefit by the Secretary of the Interior, under such rules and regulations as he may prescribe, and the proceeds of said sales, after deducting the expenses thereof, placed in the treasury of the United States to the credit of said tribe of Indians for the purposes of this trust.

By executive order of June 22, 1868, the Fort Dodge military reservation was established, which included within its limits part of the lands embraced in said cession.

By act of Congress, approved December 15, 1880 (21 Stat., 311), it was provided—

That it shall be the duty of the Secretary of the Interior to cause all that portion of the Fort Dodge military reservation in the State of Kansas, being and lying north of the land owned and occupied by the Atchison, Topeka and Santa Fe Railroad Company, for right of way for its railroad, to be surveyed, sectionized and subdivided as other public lands, and after said survey to offer said lands to actual settlers only, under and in accordance with the homestead laws of the United States. Provided, That the said Atchison, Topeka and Santa Fe Railroad Company shall have the right to purchase such portion of said reservation as it may need for its use, adjoining that now owned by it, not exceeding one hundred and sixty acres, by paying therefor the price at which the same may be appraised, under the direction of the Secretary of the Interior.

That part of the reservation relinquished by this act embraced but a small portion of the Osage lands, the remainder and greater part being lands not subject to the trust created by the treaty of 1865.

* See 4 L. D., 145.

Under the act of December 15, 1880, Frost made homestead entry for lots 9, 10, 11 and 12, in section 25, T. 26 S., R. 25 W., and lots 14 and 15 of section 30, T. 26 S., R. 24 W., Garden City, Kansas, October 1, 1881, said lots being part of the lands ceded by the treaty of 1865, and embraced in that part of the Fort Dodge military reservation relinquished by the act of December 15, 1880.

October 25, 1881, one Boyd made application to file Osage declaratory statement for the same lots, together with lot 6 of Sec. 26 S., R. 25 W., and lot 13 of Sec. 30, T. 26, S., R. 24 W., alleging settlement October 22.

November 5, 1881 Wenie made application to file Osage declaratory statement for the same lots applied for by Boyd, alleging settlement November 2, 1881. These applications were made under the act of May 28, 1880, and were rejected by the register because the tracts applied for, except lots 6 and 13, were embraced in Frost's homestead entry.

This case coming before the Department on appeal, it was held by decision of September 7, 1885 that Frost appearing to be an actual *bona fide* settler upon said land, and having offered to make proof and payment for the same, he should be permitted to commute said entry, and the money so paid should be placed to the credit of the Indians, in accordance with the terms of the treaty. The effect of that decision is to hold that all that portion of the reservation relinquished by the act of December 15, 1880, which embraced lands ceded by the treaty of 1865, should be disposed of under that treaty in the same manner and under the rules and regulations providing for the disposal of Osage Indian lands.

In the decision referred to it was distinctly held that Frost could not acquire title to the land under the provisions of the homestead law because title to land under that law could be acquired by residence without payment; but having made entry conformably to the express language of the act, alleging that he was an actual *bona fide* settler as required by the act of May 28, 1880, as well as the act of December 15, 1880, treated his entry as an application to purchase, requiring him to pay for said land \$1.25 per acre to be credited to the Osage fund agreeably to the treaty of 1865.

The Department construed the act of December 15, 1880, as not intending to abrogate or violate the treaty of 1865, whereby the Indians ceded this land to the United States for the purpose of the trust therein contained.

However, we may construe the act of December 15, 1880, with reference to the disposal of the greater part of the reservation relinquished by said act, lying north of the Osage lands, it should not be so construed as to impair or defeat the rights of the Indians guaranteed by the treaty of 1865.

The establishment of the reservation upon these lands in 1868 did not change or defeat the trust, but simply postponed the execution of

it, and when by the act of 1880 a portion of these lands were released from said reservation, they immediately became subject to disposal in the manner and under existing laws and regulations providing for the disposal of said lands.

While this appeal was pending before the Secretary, Wenie filed an application to have said case remanded for trial on questions of fact not appearing in the record then before the Department. This application was forwarded through the local office June 6, 1884, to the Commissioner, but was returned to the local office to have service perfected, and after such service the application and papers accompanying the same were supposed to have been lost.

This application was not before the Department when the decision of September 7, 1885, was rendered, and hence the facts therein contained were not passed upon. It appears, however, that this application was afterwards, to wit, November 12, 1886, transmitted by the present register of the local office to the Commissioner of the General Land Office, and is now a part of the record. The facts alleged in said application are substantially as follows:

1st, That Frost did not apply to make said homestead entry at the local office, but that C. A. Morris, register of the land office at the date of said entry, went to Dodge City, sixty miles from the local office, and without giving other notice privately informed Frost that he would take his homestead entry, and application for the same was then and there made before said register.

2d, That Frost having theretofore exercised his right of purchase of Osage lands can not be legally or equitably entitled to acquire title to another tract of said lands.

Under the decision of the Department of September 7, 1885, Frost, on December 9, 1885, offered final proof before the probate judge of Ford county, Kansas, when Wenie and Boyd appeared and filed their joint protest, which embodied the same grounds set forth in the application of Wenie to have the case remanded for further hearing.

The substance of the testimony of Frost upon all questions necessary to the adjudication of this case is as follows: Frost's entry was made before the register at Dodge City and not at the local office; that at the time of filing his application to enter, neither he nor his family were settlers upon the tract; that he commenced settlement that day, after making entry, by digging a few holes to indicate where he intended to build his house; that he afterwards established actual residence on the tract and has complied with the requirements of the homestead law. He also testified that he had availed himself of the right of pre-emption in the purchase of Osage lands.

It was also shown by the evidence that C. A. Morris, the register, went to Dodge City for the purpose of appraising the depot grounds of the Atchison, Topeka and Santa Fe Railroad, adjoining the tract in dispute. That he brought with him a plat of the depot grounds, and also

a plat of the tract in controversy, and that Frost accompanied him over the grounds.

Upon this proof the register and receiver, construing the act of December 15, 1880, as allowing entries upon these lands solely under the homestead laws, and that the term "actual settlers" as employed in said act was intended for the benefit and relief of settlers residing upon said lands at the date of the passage of the act, held that Frost has complied with the homestead law, and was qualified to make homestead entry at the date of entry. That there was no settlement on the land at the date of the act, and no proof that Frost did not settle on the tract in October, 1881. They further held that he was not required to commence settlement until six months from date of entry.

Upon the question of fraud and collusion between Morris the register, and Frost defendant, they found that Frost must have made and did make his entry at Dodge City, from information derived from the plat in the hands of the register. They found that this fact did not support said charge.

From this decision Wenie appealed. On February 5, 1887, Boyd filed an affidavit of relinquishment and abandonment of all claim to the lots entered by Frost, to which was appended a copy of his published notice to make final proof for lot No. 6, Township 26, Range 25.

On June 27 last, you took this case up for consideration, and held that although Frost had exhausted his right of pre-emption and was not qualified to make entry of Osage lands when he made homestead entry of this tract, it did not invalidate said entry, in view of the decision of the Department of September 7, 1885, holding that Frost was entitled to make proof and payment "under and in accordance with the homestead laws of the United States," he "appearing to be an actual bona fide settler upon said lots, and having appeared to make proof and payment therefor in the manner prescribed by law."

As before stated, the sole purpose and scope of that decision was to permit Frost to purchase, he being an actual settler upon the land as required by the act of May 28, 1880. It considered and treated his homestead entry as an application to purchase, but it did not intend to dispense with a qualification that the law expressly provided for, nor to pass upon his disqualification when the facts were not then before the Department.

That portion of the reservation relinquished by the act of December 15, 1880, which embraced lands ceded by the treaty of 1865, became subject to disposal under the act of May 28, 1880, and that act provides that to entitle a person to purchase said lands he must have the qualifications of a pre-emptor.

The Department may determine, as it did in this case, what may be considered an application to purchase or the initiation of the right, but it can not dispense with the two absolute requirements of the law, to wit: that the purchaser must be an actual settler, and have the qualifications of a pre-emptor.

Frost can take nothing by this decision, because it was made upon an incomplete record. That part of the record containing Wenie's protest and appeal, alleging the disqualification of Frost, was misplaced in the files of the office, and was not transmitted to the Secretary.

The holding that Frost was entitled to make proof and payment under the homestead laws was presumably based upon the impression that he was a qualified pre-emptor, and therefore entitled to purchase Osage lands.

The case of John H. Roe (2 O. L. L., 470) cited by you in support of your ruling, is not in conflict with this theory. No part of the land embraced in the Fort Kearney military reservation was subject to a trust, as in the case of the Osage lands and hence those lands upon being released from reservation could be disposed of under the homestead laws. The tenor and effect of the decision referred to is to hold that the act of July 21, 1876, releasing these lands from reservation subjected them to disposal under existing homestead laws, providing only for pre-existing settlements, in favor of those who, prior to June 1, 1876, were actual settlers thereon.

I am of opinion that Frost is not qualified to make entry of Osage lands, and said entry should be canceled.

Wenie's application to file will be received, but it is not necessary to pass upon his rights further, until he offers to make final proof, nor upon Everett's application to intervene, as the issues made in that application can be passed upon, when Wenie offers to make final proof.

PRIVATE CLAIM—PUEBLO LANDS—SURVEY.

PUEBLO OF MONTEREY.

Under the laws of Mexico in force in California, at the time of the acquisition of the latter country the pueblos were entitled for their benefit and that of the inhabitants, to the use of the lands constituting the site of the town and adjoining it, within prescribed limits; and such lands could be disposed of by the municipal authorities in *solares* or building lots; or retained for common use, except such portions as were required by the general government for warehouses, arsenals, or other public edifices, needed for national purposes.

The military reservation, custom house, state house, and quartel were not granted to the city, or intended to be granted, and the decree of the Board, confirming said grant, only passed title in accordance with the laws, usages, and customs of the nation from which the claim was derived, and conferred no larger estate than the grant.

In establishing boundaries the survey must follow the calls of the decree of confirmation, and the officers of the Land Department have no authority to establish a different line agreed to by co-terminous owners.

If the call is plain and no particular course is proscribed the shortest route, a straight line, must necessarily be adopted.

Acting Secretary Muldrow to Commissioner Sparks, October 4, 1887.

I have considered the matter of the pueblo lands of Monterey, brought before this Department on appeal from your decision of September 25,

1886. The lands in question were, on January 22, 1856, confirmed to the city of Monterey, by the Board of Land Commissioners, under section 14 of the act of March 3, 1851 (9 Stat., 631). No appeal having been prosecuted from the decree of the Commission, the same became final.

The lands confirmed are described in the decree as follows :

From the mouth of the river Monterey in the sea to the Pilarcitos; thence running along the cañada to the Laguna Seca, which is in the high road to the Presidio, thence running along the highest ridge of the mountains of San Carlos unto point Cypress further to the north; and from said point following all the coast unto said mouth of the river of Monterey, excepting and reserving therefrom such portions thereof as are held by individual owners by right or title derived from competent authority other than said pueblo or city.

On January 5, 1869, the surveyor general of California, in accordance with act of July 1, 1864 (13 Stat., 332), forwarded plat and field notes of survey of said lands for the approval of your office. Under this survey the said lands were laid off in three separate and disconnected tracts, because of the intervention of other grants, the validity of which had been recognized by surveys and patents, and which came within the exception in the decree of confirmation.

Tract No. 3 as laid down on the plat of survey is a narrow strip of land lying between the Monterey or Salinas river and the bay of Monterey, extending south from the mouth of said river to the northern boundary of the Rancho Rincon de las Salinas, and containing 110.55 acres.

Tract No. 1 lies south of the Rancho Rincon de las Salinas; has the bay of Monterey and the Rancho Punta de Pinos for its western boundary; the Salinas river and the Pilarcitos cañon for its eastern; and the Ranchos Laguna Seca, Saucito, Aguajito and Pescadores for its southern—the Rancho Noche Buena being carved out of it, near the shore of the bay of Monterey. Tract No. 1 contains 28,323.25 acres.

Tract No. 2 adjoins on the south the Ranchos Laguna Seca and Saucito, and is laid off as containing 2,431.40 acres.

Further information being desired by your office as to the correctness of the location of said pueblo lands, the surveyor general of California was instructed, on July 18, 1879, to make an investigation and report as to (1) the location, condition, etc., of the mouth of the Salinas or Monterey river in 1830 and afterwards; (2) the location, dimensions, etc., of the old custom house, state house, etc.; (3) to ascertain and represent by sketch upon the official plat the highest ridge of mountains from the Laguna Seca to Point Cypress, so as to show its direction and relation to Tract No. 2 and the southern portion of Tract No. 1.

On January 21, 1880, the surveyor general forwarded his report, with certain testimony taken in the course of his investigation and a topographical map of the mouth of the Salinas river, sketches showing the location and boundaries of the custom and state house lots; also

topographical map showing the location of the south boundary of the pueblo lands as surveyed, and the range of mountains running from near the Laguna Seca to Cypress Point. As a result of his investigation, the surveyor general was of opinion that the mouth of the Salinas river had been located too far north, and that Tract No. 3 was erroneously included in the survey of 1869.

Inasmuch as the questions relating to Tract No. 3 were entirely distinct from those arising upon the location of the other portions of said grant, on the application of the Pacific Coast Steamship Company, claiming to have purchased said tract from the city, your predecessor, Commissioner Armstrong, took up that branch of the case, and on March 10, 1880, rendered a decision wherein he concurred with the surveyor general, and held that said Tract No. 3 had been improperly included in the survey. From this decision the city of Monterey appealed; and on February 2, 1881, my predecessor, Secretary Schurz, reversed the same and declared that Tract No. 3 was part of the pueblo lands, and was properly included in the official survey. Therefore, so far as the location of Tract No. 3 is concerned, it has passed in *rem adjudicatam*, and questions touching the same are eliminated from the case.

Within the city of Monterey proper are situated what are known as the custom house, the state house, and the quartel, and the lots belonging to the same; whilst adjacent is what is known as the military reservation. The custom house and other lots are included in the survey of Tract No. 1 as part of the confirmed pueblo lands, and the military reservation is excepted from said survey as not being included in the lands confirmed to the city. In your decision of September 25, 1886, you approve of the action of the surveyor general as to the custom house, etc., and disapprove of it as to the military reservation.

As to Tract No. 2 you say in your said decision, "the survey does not appear to be in accord, so far as its eastern and southern boundaries are concerned, with the boundaries fixed in the final decree." After quoting the language of the decree and referring to the topographical map and report submitted in relation to said tract, you say, "Now, with the points Laguna Seca and San Carlos Mission properly located, without entering into a detailed description of the survey of 1869, which is set forth in the reports alluded to, it follows that a straight line between them would constitute the southern boundary of Tract 2, up to the point where it strikes the highest ridge of the mountains 'situated towards the Mission of San Carlos,' thence following the ridge, etc. And you direct a new survey to be made in accordance with your views.

From said decision, so far as the same relates to a resurvey of Tract No. 2, an appeal has been taken by the city, and also by David Jacks, who claims to have purchased from the city said lands; and so far as said decision relates to the military reservation, the Secretary of War files an earnest protest, and asks a reversal thereof.

As to the custom house, it is stated in your said decision that, on May 20, 1875, the Secretary of the Treasury by letter informed your office that inasmuch as the customs office had been discontinued at Monterey, there was no desire on the part of his Department "to contest the title to the property." With this statement all further consideration of the claim of the government to these lots is dismissed by you.

With regard to the military reservation, you hold that being within the boundaries of the grant as confirmed, and not excepted therefrom by the decree of confirmation, the United States is bound by the decree and estopped through the action of its own tribunal and its own officers from setting up any claim to said property now.

In approaching the consideration of some of the questions involved in this case, a brief reference to the history and tenure of the pueblo lands of Mexico is desirable.

After the conquest of Mexico by Spain, the earlier settlements, pueblos or towns, naturally sprung up around or near the place where was situated the presidio, or military establishment, especially as the early missions were also located at or near the presidios.

As early as August 17, 1773, the Viceroy of Spain authorized the commandant of the establishment of San Diego and Monterey "to designate common lands," and to grant titles to individuals in the vicinity of the presidios and missions. Further regulations were from time to time issued in relation to these common lands, and on March 22, 1791, the captains of the presidios were authorized to make such grants to the "extent of four common leagues, measured from the centre of the presidio square, viz: two leagues in every direction. (See p. 140, Halleck's Report, Sen. Ex. Doc., 18, Vol. 9, 1st Sess., 31st Cong.)

After the independence of Mexico the constituent Congress, on August 18, 1824, passed a decree relating to the colonization of the territories of the republic and the granting of lands therein; regulations under this decree were issued November 21, 1828. Under these laws and regulations the governors of the territories were authorized to make grants of vacant lands, but those for colonies and towns were not to be valid until approved by the supreme government; and if within ten leagues of the coast a similar approval was required as to all grants, public or private. By clause five of said decree, the general government reserved to itself the right to make use of any portions of the granted lands for the purpose of constructing warehouses, arsenals, or other public edifices, which it might deem expedient for the welfare or security of the nation. Again, on April 6, 1830, the same Congress enacted that "The executive may take such lands as it considers useful for fortifications or arsenals . . . indemnifying the states for the value thereof out of the amount due by them to the federation."

In brief, it may be said that under the laws of Mexico in force in California, at the time of the acquisition of the latter country, the pueblos or towns were entitled, for their benefit and that of their inhabitants,

to the use of the lands constituting the site of the town and adjoining it within the prescribed limits; and such lands could be disposed of by the municipal authorities in *solares* or building lots; or retained for common use, except such portions as were required by the general government for warehouses, arsenals, or other public edifices, needed for national purposes. *Grisar v. McDowell* (6 Wall., 363).

The exact nature of the estate in the public lands is not very clear. The supreme court in the case of *Townsend v. Greeley*, 5 Wall., 267, in discussing this subject, say:

It was not an indefeasible estate; ownership of the lands in the pueblos could not in strictness be affirmed. It amounted to little more than a restricted or qualified right to alienate portions of the land to its inhabitants for building or cultivation, and to use the remainder for commons. . . . This right of disposition and use was, in all particulars, subject to the control of the government of the country.

Such being the history and tenure of the public lands, the particular grant involved in this case is the next subject of consideration.

The records show that Monterey was in existence as a presidio as early as 1770. It was incorporated under the decree of the Cortez as a city June 23, 1813, and became the capital of the Province of Upper California.

In the petition for confirmation filed before the Board of Land Commissioners, it is stated that the original papers, showing the grant of the pueblo lands to the City of Monterey, were lost, but that proof of its confirmation and limits were to be found in the journal of proceedings of the Departmental Legislature on July 24, 1830, a copy of which journal was filed. It is not alleged and no evidence is adduced to show that said grant ever received the sanction of the national government, which was requisite under the law; both because of being town lands, and within ten leagues of the ocean. And it may well be questioned whether such sanction was ever given. But be that as it may, the grant was confirmed by the Commission, as hereinbefore stated, and the propriety of that confirmation is not now to be inquired into.

The first question which presents itself for consideration is as to the correctness of your action in directing the surveyor general to embrace within the survey of Tract No. 1 the military reservation claimed by the United States.

You decide, in substance, on this question, that inasmuch as the boundaries of the grant as confirmed embrace within their limits the military reservation, custom house, etc., and no exception in favor thereof was made in said decree, it necessarily confirms the land covered by the reservation, etc., to the city.

It is said in support of this position that the act of March 3, 1851, *supra*, organized a commission to "ascertain and settle" private land claims in California; that such ascertainment and settlement could not be made without determining what were public and what private lands, and separating the latter from the former; that such ascertainment

necessarily involved any claim, title or right which the United States might have to any lands claimed; that it was intended the rights of the government should be passed on by said commission, for Congress provided, by section four of said act, for the appointment of an officer whose declared duty it was "to superintend the interests of the United States in the premises;" and by section eight that said Board should decide the case on the evidence of claimant and that "produced in behalf of the United States"; and by section fifteen that final decrees under said act "shall be conclusive between the United States and said claimants."

Conceding the force of these arguments, the answer is that the lands claimed by the government never were included in the lands granted to the city; were not included in the claimed grant submitted to the Board, consequently the right of the government to said lands was not submitted to, questioned, or passed upon by that tribunal, and its decree in no way affects the government's title to the same.

Now it has been shown that by the laws of Mexico, in force at the time of the acquisition of California, the general government expressly reserved from the operation of the pueblo grants all lands needed for national purposes, and prohibited any interference with such reservations by the municipal authorities by attempted disposition or otherwise. Nor was Mexico singular in this respect, for from the very necessity of the case, such laws, either written or unwritten, were common to all nations at that time.

As has been before stated, Monterey was one of the earliest settlements under the Spanish dominion in Mexico, of which we have any record. About 1770 the Mission of San Carlos was established under the protecting care of the presidio at Monterey, then an actual military reservation. About the same time was built the old battery, San Carlos, first established near the water's edge; later enlarged, improved and extended up the hill. Still later another and auxiliary battery was built. Halleck states in his report (*supra* p. 132) that there are in the government archives numerous orders both from the Viceroy of New Spain and the ministers of the Mexican republic, for the repairs of these identical works, for the mounting of guns on them, etc. These fortifications have played their parts in the military history of the country; were assailed and captured by the insurgents under Alvarado in 1836, and again by the naval forces under Commodore Jones in 1842, and finally were occupied as and constituted the defences of the harbor of Monterey at the time of its final capture on July 7, 1846, when they were taken possession of by the military authorities of the United States. Early in 1847 a survey and map of the premises was made by Captain Warner, United States Topographical Engineer, the original of which was filed in the War Department and a copy transmitted with Halleck's report to Congress. From the time of its capture in 1846 the property remained under the control of the United States government;

but intruders were constantly making encroachments on the same; and under the new order of things the town authorities were easily persuaded to make pretended sales and conveyances of lots within the reservations. In order to put a stop to these annoyances, on the recommendation of the Secretary of War, the President, November 23, 1866, issued an order that—

The reservation at Monterey, California, as described in the survey and field notes of Lieut. Warner, Corps of Engineers, made in 1847, by order of General, then Captain, Halleck is hereby made for military purposes, and the Secretary of the Interior will cause it to be noted in the Land Office, to be reserved as a military post.

The letter of the Adjutant General, conveying this order to General Halleck, then commanding in California, directed him "to hold military possession of the reservation."

It will thus be seen that this property has been held as a military reservation, occupied as a fortification and garrison from about 1770—long before any pretended grant to the town—down to the time of the capture of Monterey, sixteen years after the date of the alleged grant, and since then continuously claimed by the United States as such reservation.

Can it be supposed that the town authorities in seeking the grant would have ventured to propose the cession of lands then in use and occupied by the federal authorities for civil and military purposes? Or can it be believed that the national authorities would have made such a grant if it had been thought that it gave title and possession to a fortification built more than fifty years before and maintained at a great expense, at an important point on the coast, essential to the protection and defense of one of the oldest towns in the country, then the provincial capital, the legislature of which was then in session within the capitol building; the custom house in use in the collection of needed marine revenue for the nation, and the fort garrisoned by its troops?

Is it not very evident then that the lands in question were not included, or intended to be included, in the grant made by the territorial legislature of California, even if it had possessed authority so to do; but that under the laws then in existence, the usage and custom of nations, such property was expressly excepted from the operation of said grant and reserved for the use of the national government of Mexico?

Nor can there be any question that, prior to the conquest, under the laws, the Mexican authorities could at any time have taken possession and made reservation for national purposes of lands embraced in the pueblo grant. To this right of Mexico and all others the United States succeeded, first by conquest in 1846, and then by treaty in 1848; and, in continuous assertion of a right to this property for military purposes, in 1847 Captain Warner, by command of his superior officer, made survey of and staked off the lines of the military reservation. But the reservations for national purposes, for fortifications and garrison, for

custom house, quartel and state house had many years before been made, and the premises selected were in open and notorious use and occupation for the designated purposes long prior to the date of the alleged grant to the town. Whether there be record evidence of such reservations is immaterial in the face of the authoritative, open, notorious, and conceded occupation and use of the premises for national purposes.

I therefore assume, as beyond controversy, that neither the military reservation, custom house, state house, or quartel were granted or intended to be granted to the city, and the question arises whether the decree of the Board of Land Commissioners confirmed as belonging to the town lands which were never granted to it.

Section 11 of the act of 1853, organizing the Board of Land Commissioners, is as follows :

The Commissioners in deciding on the validity of any claim shall be governed by the treaty of Guadalupe Hidalgo, the law of nations, the laws, usages and customs of the government from which the claim is derived, the principles of equity, and the decisions of the supreme court of the United States, so far as they are applicable.

The petition asking for confirmation of the grant was filed in the name of the corporate authorities of Monterey, described the outboundaries of the grant, declared that evidence of its limits and confirmation would be found in the proceedings of the departmental legislature of July 24, 1830, and applied for its confirmation "in accordance with the laws, usages and customs of the government of Mexico then in force." In short, the claim was for pueblo lands theretofore designated; to be confirmed as pueblo lands, subject to all the incidents of that tenure. The Board of Commissioners confirmed the claim as petitioned for; that is, it confirmed the pueblo lands as designated; and, under the provisions of the above quoted section of the organic act, said confirmation only passed title in accordance with "the laws, usages, and customs of the nation from which the claim was derived," and which expressly excepted from the operation of the grant lands reserved or needed for public purposes. The decree conferring no larger estate or property than the grant. See *San Francisco v. Canavan*, 42 Cal., 555. Such being the settled law, doubtless it never occurred to the Commissioners to declare that their decree should not operate upon property which the law had already reserved, and excepted from such grants, and to which no claim had been set up by petitioners.

I therefore think your judgment was erroneous in relation to the tracts reserved, as before stated.

The remaining question to be determined relates to the east and south line of Tract No. 2, as located by the surveyor-general; and about the description of which there seems to be a discrepancy in the official documents purporting to be copies of the decree of the Board of Land Commissioners.

By section two of the act organizing the Board of Commissioners it is required that the Secretary thereof "shall keep a record of the proceedings of the Board, in a bound book, to be filed in the office of the Secretary of the Interior on the termination of the commission."

In the record of the proceeding thus filed and in your office, and to the correctness of which, in addition to the Secretary, the three judges have certified after examination, the decree of confirmation is in the exact language first herein quoted, and gives the line, after arriving at Laguna Seca, as "thence running along the highest ridge of the mountains of San Carlos unto Point Cypress," etc. In your decision the language of the decree of the Board is not quoted, but the boundaries as defined by the Territorial Deputation are given, and you state, "the Board made a decree confirming to the pueblo its lands by the boundaries above described."

The description quoted from the proceedings of the Territorial Deputation differs from the decree of the Board only in the language used in reference to the line, after leaving Laguna Seca; that language is: "thence running along the highest ridge of the mountains (situated towards the Mission) of San Carlos"—the words in brackets not being found in the official copy of the decree on record in your office.

The surveyor general, in his report, gives what purports to be a copy of a copy of said decree, certified to by the clerk of the United States district court. In this copy the same language is used as in your decision, and in all the briefs of counsel filed in the case the same language is found. It would therefore seem that either all parties have fallen into the error of adopting the language of the Territorial Deputation, or that the words in brackets were inadvertently omitted from the official record, and the omission was not observed by the Secretary and the three judges when it was examined, before the certification, by them.

The old church and buildings of the Carmelo or San Carlos Mission were located on the north bank of the Carmelo river, where the latter empties into the bay of Carmelo. The river flows towards its mouth in nearly an east and west course. Parallel with the course of the river, and at a short distance north thereof is a range of mountains. Along the valley of this river, and extending to the top of this range of mountains, were formerly the lands occupied by the Indians belonging to the mission, and known as the mission lands. This is the one continuous range of mountains, lying south of Monterey, north of the mission lands, and terminating with a gradual descent at Point Cypress. So that there is but one range of mountains, which can be referred to in the decree, whether that range be described therein as "the mountains of San Carlos," or as "the mountains situated towards the mission of San Carlos." In my opinion the discrepancy between the two descriptions is not very material, and properly considered can make no difference as to what seems to be the plain meaning of either or both expressions. I shall therefore pass upon the remaining question of boundary as though the decree were as you have quoted it.

The boundaries thus defined are—

From the mouth of the river of Monterey in the sea to the Pilarcitos; thence running all along the cañada to the Laguna Seca, which is in the high road to the Presidio; thence running along the highest ridge of the mountains situated towards the Mission of San Carlos, unto Point Cypress further to the north, etc.

The line thus described follows the banks of the river from its mouth in a southeastly direction until it reaches the Pilarcitos cañada; it then turns almost at right angles, at the point of intersection, and runs along the cañada in a southwest course until it comes to the end of the cañon. There is no controversy about the line, so long as it continues in the Pilarcitos cañada. But the surveyor-general, after he reached the portzuello or opening of the cañada, did not fully follow the outboundaries of the grant as described in the decree, and go "to the Laguna Seca, which is in the high road to the Presidio"; but deflected further to the west and completed the survey of Tract No. 1. He thereafter commenced the survey of Tract No. 2, at the southwest corner thereof, at a point which constitutes the common corner of the James Meadows tract, the Ranchos Aguajito and Canada de la Segunda. Thence the lines are run north and east until the northeast corner of said Tract No. 2 is reached, which corner seems, from the field notes, to have been established by drawing a line from the common corner formed by Tract No. 1, the Rancho Pilarcitos and the Rancho Laguna Seca, to a point from which an oak tree, "marked M 15, standing on the main ridge, bears south twenty-five degrees west distant thirty-five chains." Throughout no reference is made or regard paid to the call for the Laguna Seca in the road to the Presidio, but a dry laguna, located near the portzuello of the Canada Pilarcitos, is delineated upon the plat, though the road is not represented, nor is said laguna stated to be the one described in the decree.

On the topographical map, made under the orders of your officers, by deputy surveyor Herrman, a dry lagoon is located about a mile to the west and south of the first. From this it is apparent, if the Herrman map is correct, that in making the official survey the plain call for the Laguna Seca in the road to the Presidio was entirely ignored and an arbitrary point established as the northeast corner of Tract No. 2. It is asserted by the appellants here that, even if said call was ignored, the northeast corner is substantially the same which would have been established if the call had been followed, as shown on the Herrman map. This apparently is so, but I am not prepared to concede it as a matter of fact.

In your decision you reject the east, south and a portion of the north line of said tract as established in the official survey, and draw a straight line from the head of the Pilarcitos canon to the Laguna Seca, in the road to the Presidio, as shown on the Herrman map. Having then the Laguna Seca, in the Presidio road, as the starting point, you draw a straight line therefrom to the ruins of the old buildings of the mission,

as it is designated and marked on the same map; and you say that this straight line from the Laguna "to the point where it strikes the highest ridge of the mountains '*situated towards the Mission of San Carlos,*'" thence along said ridge until intercepted by the southern boundary of the patented rancho Saucito at course No. 38 on the Herrman map, "would constitute the southern boundary of Tract No. 2."

This line, if adopted, would exclude from the survey nearly the whole of said tract as located by the surveyor general. But I am very clear that you misapprehended, what to me, is the plain call of the decree; and prescribed a line not in accordance therewith. Evidently you must have understood the call to be from the laguna "towards the old mission buildings until the intersection of the highest ridge of the mountains."

It is clearly the duty of the surveyor to go to the Laguna Seca in the high road to the Presidio. Having attained this point, the next call is equally plain and mandatory. It is: "thence running along the highest ridge of the mountains (situated towards the Mission) of San Carlos." The plain call here to be gratified is "the highest ridge of the mountains." No particular course is prescribed by which that ridge is to be reached, and the shortest route, which is a straight line, must necessarily be adopted. I do not see any escape from this inevitable conclusion. Exactly at what point the highest ridge will be attained I can not say, but apparently the point marked No. 1 on Herrman's map would be the nearest in a straight line from the Laguna as located on that map, and not the red line designated by him as the "proper line."

The mountain ridge to be reached is not only the highest but the main ridge of the mountains—the "cuchillo" as termed by the witnesses—and when reached the main ridge is to be followed throughout its course to Point Cypress.

I observe that instead of following the mountain ridge in its course and curves, the official survey delineates the southern boundary of No. 2 as a straight line, it being sometimes north and sometimes south of the ridge, as laid down by Herrman. This is without any authority whatever, and must not be. The official survey must be in accordance with the line described in the decree; that says "running along the highest ridge of the mountains . . . unto Point Cypress"; and along the highest ridge the line must run. It is said that the straight line was run by agreement with the coterminous owners on what is called "the give and take principle." But the surveyor general is clothed with no authority to make any such agreement in relation to his official surveys. After such survey is made in accordance with law, approved and carried into patent, it is of course competent for coterminous owners to straighten their lines, or do otherwise as they may determine. But the officers of the Land Department are without authority to carry into their official acts matters of private agreement, as substitutes for official requirements, or excuses for disregarding the same.

Your said decision is accordingly modified, the official survey of Wagner rejected; and you will direct a new survey to be made, in accordance with the views herein expressed.

Herewith are returned the papers in the case, and you will inform the Secretary of War and the Secretary of the Treasury hereof.

Since the case has been pending in this Department, the counsel for one of the appellants have filed a number of affidavits relating to the boundaries of No. 2. But inasmuch as I find no ambiguities in relation to the boundaries of said tract, I have not considered the affidavits, and send the same to you to be kept with the other papers.

RAILROAD GRANT—INDEMNITY LANDS—TRESPASS.

WISCONSIN CENTRAL R. R. CO.

No forfeiture having been declared in relation to this grant, the power of sale thereunder continues, as though no breach of condition had occurred, and the parties in interest are entitled to patents as evidence of their title as to all lands along the constructed portion of said road, and for indemnity lands from such as have been lost.

While no action is advised in the direction of restraining the company from trespass upon lands covered by indemnity selections made in lieu of lands apparently earned by construction, the order of August 15, 1837, revoking the indemnity withdrawal made for the benefit of said company will stand, pending the early adjustment of the grant.

Secretary Lamar to Commissioner Sparks, October 6, 1887.

I have before me two letters from W. K. Mendenhall, Esq., attorney of the Wisconsin Central Railroad Company, both dated April 3, 1883. One of said letters asks that you be instructed to submit for my approval a list of the lands claimed by said company "opposite to and coterminous with the road constructed prior to December 31, 1876, the date of the expiration of the grant." The other letter asks that you be instructed to send up for my approval certain lists of lands selected by said company as indemnity for lands in place, lost by sales, etc., as provided in the granting act; which lists are on file in your office, unacted upon.

I have also before me a communication under date of November 19, 1883, from Mr. Edwin A. Abbott, in behalf of the bond and stockholders of said company, and also as attorney for the State of Wisconsin, urging that patents be issued to said company for the residue of its land grant, according to the lists now on file in your office. Mr. Abbott states that, under decisions of the State courts, it is held that the equitable title being absolutely vested in the company, the said lands are taxable as their property; and certain towns and counties have sold the same for taxes, and parties are in possession under tax deeds, and thus, under color of title, are enabled to cut and remove the valuable

timber upon large tracts of land, whilst the company being without legal title to said land in the absence of patents is unable to recover the same or protect its interests therein; and that the unsettled condition of the title to these lands is greatly retarding the development of that country.

I am also in receipt of your letter of February 24, 1886, inclosing copy of report of Special Agent Speer, relative to alleged timber trespasses by employees, agents and sub-contractors of the Wisconsin Central Railroad Company upon lands in townships 38, 39 and 40 N., ranges 4 and 5 E., Wausau land district, Wisconsin.

It is stated that the company admits the cutting of timber, but denies the trespass, claiming that said lands are within the indemnity limits of the grant to said road, and that selections of said tracts were duly made by the company and filed in your office, but as yet have not been acted upon. Inasmuch as legal title to said tracts of land has not yet been conveyed to said company, you recommend that the Attorney-General be requested "to cause its officers and agents to be restrained from cutting or disposing of the timber cut" upon said lands.

In considering your recommendation and the application referred to, it is necessary to examine the claims of said company and the legislation under which they arise.

By the third section of the act of May 5, 1864, (13 Stat., 66,) there was granted to the State of Wisconsin for the purpose of aiding in the construction of a railroad from Portage City or Fond du Lac, as might be determined, in a northwestern direction to Bayfield, thence to Superior on Lake Superior, every alternate odd-numbered section of public land for ten sections in width on each side, on the same terms and conditions as contained in the act of June 3, 1856 (11 Stat., 20), with a right to take indemnity lands within twenty miles of the line of the road.

The seventh section of the act provided that when "twenty consecutive miles of any portion" of said road was properly completed to the satisfaction of the Secretary of the Interior, patents shall issue conveying to the company title to the lands "on each side of the road, so far as the same is completed," and in like manner as each twenty miles is completed.

Section nine of said act further provided, "That if said road, mentioned in the third section aforesaid, is not completed within ten years from the time of the passage of this act as provided herein, no further patents shall be issued to said company for said lands, and no further sale shall be made, and the lands unsold shall revert to the United States."

The Wisconsin Central Railroad Company became and is entitled to the benefit of the land grant made by this grant.

By act of April 9, 1874 (18 Stat., 28), the time for the completion of said road was "extended until the thirty-first day of December, 1876."

Prior to this last date, the entire line of the road from Portage City northerly to Ashland was completed, except a gap of about nine miles

lying north of Sec. 21, T. 41 N., R. 1 W. (Butternut Creek), and south of Sec. 11, T. 42 N., R. 2 W. (Chippewa Crossing), which portion was completed May 30, 1877—four months after the time limited by law.

No portion of the road provided for between Ashland and Superior has yet been built, and is not likely to be; because the intersection of the constructed road a short distance south of Ashland by the Northern Pacific Railroad renders the construction of such line unnecessary and unprofitable. The company has from time to time received patents for portions of the land along its line, but yet claims patents for lands within both granted and indemnity limits.

The lands upon which the trespasses mentioned in your letter are stated to have been committed are within the indemnity limits of that portion of the Central Wisconsin Railroad which was completed prior to December 31, 1876, or within the time limited by law. And, if the said railroad company is entitled to indemnity for lands in place lost along that portion of its line which was properly constructed in time, and the lands cut upon have been selected as such indemnity lands, I do not see the advisability of restraining them from the use of said lands, because said selections have not yet been acted upon by your office, said company having done all in its power to obtain complete title to said lands—supposing that in such a case a court of equity would grant the injunction sought, of which I have the gravest doubts.

Unless there be some legally sufficient reason to the contrary, I think that the adjustment of the grant to aid in the construction of said road should be forthwith proceeded with, selections of granted and indemnity lands submitted for my approval, rather than to institute legal proceedings against the company, from which it would have been amply protected, if the Land Department had not delayed the issue of patents for lands earned ten years ago.

My views on this subject were plainly expressed in the case of the Wisconsin Railroad Farm Mortgage Land Company (5 L. D., 91), and that of the Chicago, St. Paul, Minneapolis and Omaha Railway Company (ib., 511), both of which cases arose under grants made by the acts of Congress hereinbefore recited, and both of which decisions related to indemnity selections; and the last was made in response to a recommendation by you that the Attorney General be requested to obtain an injunction prohibiting the Omaha Railroad Company from cutting upon lands within its indemnity limits, the selections for which had not yet been approved. The recommendation was denied, and you were requested to adjust said grant and transmit lists of said selections for my approval.

It is said, however, there is a difference between the grant in that case and the one under which the Central Wisconsin Railroad was built. The difference alluded to is to be found in the ninth section of the granting act of May 5, 1864, *supra*, which declares that if the road under consideration is not completed within the time fixed by law, "no further patents

shall be issued to said company for said lands, and no further sale shall be made, and the lands unsold shall revert to the United States."

The last part of said section, declaring that "no further sale shall be made and the lands unsold shall revert to the United States," is common to all the grants made to Wisconsin by the acts of 1856 and 1864, and was construed by the supreme court, in the case of *Schulenberg v. Harriman* (21 Wall., 44).

The court said: "The provision in the act of Congress of 1856 that all lands remaining unsold after ten years shall revert to the United States, if the road be not then completed, is no more than a provision that the grant shall be void if a condition subsequent be not performed. . . . The prohibition against further sales, if the road be not completed within the period prescribed, adds nothing to the force of the provision. A cessation of sales in that event is implied in the condition that the lands shall then revert; if the condition be not enforced the power to sell continues as before its breach, limited only by the objects of the grant and the manner of sale prescribed in the act."

The act of 1856, which the court was here construing, did not provide for the issue of patents, but the seventh section of the act of 1864 declared that upon the completion "of twenty consecutive miles of *any portion* of said railroads . . . patents shall issue conveying the right and title to said lands to the said company entitled thereto, on each side of the road, so far as the same is completed, and coterminous with said completed section."

It seems to me, in view of the language of the supreme court, that the prohibition against the issue of patents, like the prohibition against further sales, "adds nothing to the force of the provision." It is but the expression of that which was necessarily implied. The provision that the lands should revert on the happening of the contingency necessarily implied equally the non-issue of patents and the stoppage of sales. The whole section and the whole act must be construed together, and the object of Congress ascertained. The supreme court say that object was "no more than a provision that the grant shall be void if a condition subsequent be not performed." Upon failure to perform the condition subsequent, it was in the power of Congress alone to declare the forfeiture; and if the forfeiture was not enforced, the court says "the power to sell continues as before its breach, limited only by the objects of the grant and the manner of sale prescribed by the act."

No forfeiture having been declared in relation to this grant, the power of sale thereunder continues, as though no breach of condition had occurred, and the parties in interest are entitled to patents as evidence of their title as to all the lands along the constructed portion of said road, and for indemnity lands for such as have been lost.

On August 15, 1887, an order was issued revoking the indemnity withdrawals heretofore made for the benefit of the grant to the Wisconsin

lying north of Sec. 21, T. 41 N., R. 1 W. (Butternut Creek), and south of Sec. 11, T. 42 N., R. 2 W. (Chippewa Crossing), which portion was completed May 30, 1877—four months after the time limited by law.

No portion of the road provided for between Ashland and Superior has yet been built, and is not likely to be; because the intersection of the constructed road a short distance south of Ashland by the Northern Pacific Railroad renders the construction of such line unnecessary and unprofitable. The company has from time to time received patents for portions of the land along its line, but yet claims patents for lands within both granted and indemnity limits.

The lands upon which the trespasses mentioned in your letter are stated to have been committed are within the indemnity limits of that portion of the Central Wisconsin Railroad which was completed prior to December 31, 1876, or within the time limited by law. And, if the said railroad company is entitled to indemnity for lands in place lost along that portion of its line which was properly constructed in time, and the lands cut upon have been selected as such indemnity lands, I do not see the advisability of restraining them from the use of said lands, because said selections have not yet been acted upon by your office, said company having done all in its power to obtain complete title to said lands—supposing that in such a case a court of equity would grant the injunction sought, of which I have the gravest doubts.

Unless there be some legally sufficient reason to the contrary, I think that the adjustment of the grant to aid in the construction of said road should be forthwith proceeded with, selections of granted and indemnity lands submitted for my approval, rather than to institute legal proceedings against the company, from which it would have been amply protected, if the Land Department had not delayed the issue of patents for lands earned ten years ago.

My views on this subject were plainly expressed in the case of the Wisconsin Railroad Farm Mortgage Land Company (5 L. D., 91), and that of the Chicago, St. Paul, Minneapolis and Omaha Railway Company (ib., 511), both of which cases arose under grants made by the acts of Congress hereinbefore recited, and both of which decisions related to indemnity selections; and the last was made in response to a recommendation by you that the Attorney General be requested to obtain an injunction prohibiting the Omaha Railroad Company from cutting upon lands within its indemnity limits, the selections for which had not yet been approved. The recommendation was denied, and you were requested to adjust said grant and transmit lists of said selections for my approval.

It is said, however, there is a difference between the grant in that case and the one under which the Central Wisconsin Railroad was built. The difference alluded to is to be found in the ninth section of the granting act of May 5, 1864, *supra*, which declares that if the road under consideration is not completed within the time fixed by law, "no further patents

shall be issued to said company for said lands, and no further sale shall be made, and the lands unsold shall revert to the United States."

The last part of said section, declaring that "no further sale shall be made and the lands unsold shall revert to the United States," is common to all the grants made to Wisconsin by the acts of 1856 and 1864, and was construed by the supreme court, in the case of *Schulenberg v. Harriman* (21 Wall., 44).

The court said: "The provision in the act of Congress of 1856 that all lands remaining unsold after ten years shall revert to the United States, if the road be not then completed, is no more than a provision that the grant shall be void if a condition subsequent be not performed. . . . The prohibition against further sales, if the road be not completed within the period prescribed, adds nothing to the force of the provision. A cessation of sales in that event is implied in the condition that the lands shall then revert; if the condition be not enforced the power to sell continues as before its breach, limited only by the objects of the grant and the manner of sale prescribed in the act."

The act of 1856, which the court was here construing, did not provide for the issue of patents, but the seventh section of the act of 1864 declared that upon the completion "of twenty consecutive miles of *any* portion of said railroads . . . patents shall issue conveying the right and title to said lands to the said company entitled thereto, on each side of the road, so far as the same is completed, and coterminous with said completed section."

It seems to me, in view of the language of the supreme court, that the prohibition against the issue of patents, like the prohibition against further sales, "adds nothing to the force of the provision." It is but the expression of that which was necessarily implied. The provision that the lands should revert on the happening of the contingency necessarily implied equally the non-issue of patents and the stoppage of sales. The whole section and the whole act must be construed together, and the object of Congress ascertained. The supreme court say that object was "no more than a provision that the grant shall be void if a condition subsequent be not performed." Upon failure to perform the condition subsequent, it was in the power of Congress alone to declare the forfeiture; and if the forfeiture was not enforced, the court says "the power to sell continues as before its breach, limited only by the objects of the grant and the manner of sale prescribed by the act."

No forfeiture having been declared in relation to this grant, the power of sale thereunder continues, as though no breach of condition had occurred, and the parties in interest are entitled to patents as evidence of their title as to all the lands along the constructed portion of said road, and for indemnity lands for such as have been lost.

On August 15, 1887, an order was issued revoking the indemnity withdrawals heretofore made for the benefit of the grant to the Wisconsin

Central road, and directing the restoration of the lands within the indemnity limits to the public domain, and that filings and entries thereon should be received after thirty days notice. An application has been made to me in behalf of said company to suspend the said order of revocation and restoration until such time as the pending selections of lieu lands shall have been acted upon.

It is represented that the lands in question are only valuable for the timber growing on them, and that this makes them very valuable; that if the order of revocation is permitted to go into effect, a large number of persons will, under pretext of the lands being thrown open to the public, go upon the lands covered by pending selections, and speedily denude them of the timber for which alone said lands are of any value; that it would be impossible for the company to protect its interests in the premises, otherwise than by obtaining an injunction from the local courts against every individual squatter, and this would cause an immense amount of litigation and entail undue expense and trouble on the company. In short, it is earnestly urged that the circumstances of the case make it an exception, and bring it within the equitable rule which grants relief in order to avoid a multiplicity of suits, or where the injury is irreparable.

I recognize the force of these arguments and facts; but after careful consideration must decline to suspend the order of revocation as asked. An early adjustment of this claim will obviate the greater part of the injuries to the company apprehended, and certainly correct those which may in the meantime occur.

These matters, thus pressed upon me, were all thought of and carefully weighed prior to the issue of the order of revocation in relation to this and other roads. And further consideration confirms the conclusion then arrived at, that it was the duty of the Department to remove all obstacles in the way of the settler who desires to locate upon public lands within indemnity limits, to which the railroad company has acquired no rights. Ample security is afforded for the protection of any rights acquired by the company, whilst the opportunity is also afforded the settler to challenge selections improperly made.

No exception has been made to the orders of revocation, in favor of any company, except the Chicago, St. Paul, Minneapolis and Omaha Railroad Company. The adjustment of that grant had been made by you, transmitted to this Department; exceptions taken to your adjustment, and argument thereon had prior to the issue of the order of revocation in relation to that road. So that at the time of the issue of the order in that case, the adjustment of its grant was under consideration here, the Department was ready to act, and a suspension was properly ordered.

But in view of the strong equities presented, I direct that you will specially advance the adjustment of this grant, and transmit lists for approval at the earliest possible moment.

RAILROAD GRANT—INDEMNITY ADJUSTMENT.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RY. CO.

In the adjustment of this grant the right to indemnity must be recognized as extending to losses ascertained at the time of definite location, because, under the act of 1856, of land "sold or otherwise appropriated" by the United States, and under the act of 1864, because of land "sold, reserved or otherwise disposed of," or "sold or otherwise appropriated."

Lands previously granted under either the swamp grant, or the two other internal improvement grants to the State were, if not "sold" certainly "otherwise appropriated" or "reserved or otherwise disposed of," and for all such losses which took place prior to definite location the company is entitled to indemnity.

The foregoing conclusions are not in conflict with the provision found in each of said acts which excludes from the operation thereof "all lands reserved to the United States by any act of Congress for the purpose of aiding in any object of internal improvement or in any manner, or for any purpose whatever."

Such disposition of said indemnity question is also in harmony with the highest judicial interpretation of similar legislation; for, although the ruling in the Barney case involved an act granting "land", while the grant of 1864, was of "public land," said grant was supplemental to that of 1856, and expressly declared that the additional sections were granted "upon the same terms and conditions as are contained" in the original act which used the term "land" in the granting clause.

Both in the title and the body of the acts under consideration the terms "land" and "public land" are used interchangeably as meaning the same thing.

The line of this road under the grant of 1856, having been definitely located, and withdrawal made for indemnity purposes prior to the passage of the act making the grant to the Wisconsin Central, the lands within the six and fifteen miles limits of the first road were for all purposes "reserved" from the grant to the second. The company herein is therefore entitled to the whole of the designated sections within the six miles limits and to be indemnified for losses therein out of the designated sections within the fifteen miles limits, to the exclusion of the Wisconsin Central as fully as though the grant to it had never been made.

As to overlapping lands derived under the respective grants made by the act of 1864, the Wisconsin Central and this company must be held as tenants in common.

There was implied authority in the act of 1864, for the relocation of the West Wisconsin Railway, and such new location made in 1864, was recognized and approved by the act of March 3, 1873, but by the second location all rights acquired by the first were waived and abandoned, and no claims of said company under the act of 1864, can conflict with those of the Omaha company derived under the grant of 1856, the location of 1858, and the construction of its road.

Although neither the act of 1856, nor that of 1864, fixed the exact point on the St. Croix river to which this road should be built, it is apparent from the provisions of both that some one point was intended and not several. It is therefore held, that when the line of said road reached Hudson, on said river, that such point fixed the terminus of the road, and that the grant of lands could not be increased by a further extension of the road to another point on said river.

The actual road as located and constructed is the object and measure of the grant, and the base of its locality; and with the road thus fixed, lines drawn perpendicular to it at each end will determine the final limits of the grant.

The indemnity accorded to the Wisconsin Farm Mortgage Co., beyond the line constructed between Portage and Tomah, for losses sustained between said points, should not be deducted from the indemnity selections made by this company.

Indemnity cannot be allowed for losses sustained through the erroneous certification of lands in place to another company or for lands sold by the government after definite location of the road. The remedy in such cases must be sought in court.

Secretary Lamar to Commissioner Sparks, October 7, 1887.

On March 22d last you were directed to cause to be adjusted the land grant to the Chicago, St. Paul, Minneapolis and Omaha Railway Company, in Wisconsin, and transmit for my approval proper lists of lands selected by said company within the indemnity limits of its grant. On August 3d you transmitted List No. 1, embracing 82,805.26 acres, which was approved by me, and on August 13th returned to you.

From your said letter it appears that the acreage within the odd numbered sections along the main line, under both grants, amounts to 857, 957.53

From which are to be deducted—

The number of acres in the granted limits heretofore approved	498, 605.08
The number of acres in the granted limits yet subject to the grant	42, 124.73
The number of acres in the indemnity limits heretofore approved.....	30, 682.79
The number of acres in list No. 1, transmitted for approval and since approved by me	82, 805.26
The losses in granted limits, for which you say no indemnity should be allowed.....	203, 739.67
	857, 957.53

So that from your statement it would appear the company has received all it is entitled to.

The 203,739.67 acres for which you hold no indemnity should be granted are made up of several items. Of this total amount, 39,026.23 acres are deducted, because double that number of acres are within the overlapping limits of the Bayfield branch of said road, within which limits each company is entitled to one half only of the granted lands. Inasmuch as the grant for the main and branch line were made by the same act, the correctness of this deduction is not questioned by the company.

Of the balance of the amount deducted, 44,782.42 acres are on account of lands which passed to the State under the swamp land grant, and two other acts granting lands to it for purposes of internal improvement—all of said grants being prior to that made to the railroad company.

The act of June 3, 1856 (11 Stat., 20), granted to the State of Wisconsin, for the purpose of aiding the construction of this road "every alternate section of land, designated by odd numbers, for six sections in width, on each side" of said road.

It also provided, if, at the time said road was definitely located, it should appear that the United States had "sold any sections, ... granted as aforesaid," the State might select from lands of the United States, "nearest to the tiers of sections above specified, so much land in alternate sections as shall be equal to such lands as the United States have sold, or otherwise appropriated," said lands so located not to be further than fifteen miles from the line of the road.

By act of May 5, 1864 (13 Stat., 66), there was granted to the State in aid of this road "every alternate section of public land designated by odd numbers, for ten sections in width, on each side of said road, deducting any and all lands that may have been granted for the same purpose by act of Congress of June 3, 1856, upon the same terms and conditions as are contained" in said act of 1856.

It is further provided that if at the time of the definite location of said road it appears that the United States have "sold, reserved, or otherwise disposed of, any sections granted as aforesaid," then selection may be made "from the public lands of the United States nearest to the tiers of sections above specified, of as much land in alternate sections as shall be equal to such lands as the United States have sold or otherwise appropriated:" the lands so located not to be further than twenty miles from the line of the road: and no selection to be made "in lieu of lands received under said grant of June 3, 1856, should any such deficiency exist."

Both the act of 1856 and that of 1864 contained the common provision that "all lands reserved to the United States by any act of Congress for the purpose of aiding in any object of internal improvement, or in any manner, or for any purpose whatever," should be excluded from the operation of the act, except so far as may be necessary to locate the right of way through the same.

The map of definite location of the line of road, now under consideration, from the St. Croix river, to Lake Superior on the north, was filed on March 2, 1858, under the provisions of the act of 1856, but the work of constructing the road was not commenced until some time after the passage of the act of 1864.

The indemnity granted by both acts was for losses ascertained at the time of the definite location, because, under the act of 1856, of land "sold, or otherwise appropriated" by the United States; and under the act of 1864, because of land "sold, reserved or otherwise disposed of," or "sold or otherwise appropriated."

It would seem that lands which had been previously granted under either the swamp land grant or the two other internal improvement grants to said State, had been, if not "sold", certainly "otherwise appropriated," or "reserved or otherwise disposed of" by the United States, and for all such losses, which had taken place prior to the definite location of the road, the company is entitled to indemnity lands, unless there is something else in the law to the contrary.

It is not stated in your letter why the company is not entitled to indemnity for lands thus lost; but it is inferred from the language used that you are of the opinion that the provisions in each act, which excludes from the operation thereof "all lands reserved to the United States by any act of Congress for the purpose of aiding in any object of internal improvement, or in any manner, or for any purpose whatever," requires that you should deny to the company the indemnity which otherwise it would be entitled to.

Whatever strength may have formerly been in this position was completely destroyed by the decision of the supreme court in the case of the Winona & St. Peter R. R. Co. v. Barney, 113 U. S., 618.

The grant in that case was by act of March 3, 1857 (11 Stat., 195), to the then Territory of Minnesota, to aid in the construction of certain railroads therein, and is almost identical with that of 1856 to Wisconsin. It was for "every alternate section of land designated by odd numbers, for six sections in width on each side of said road," etc. The indemnity clauses were the same; providing that in case of losses, ascertained at the time of definite location, because of any of the "granted" sections being "sold," then selection could be made of other lands of the United States within the indemnity limits of an amount "equal to such lands as the United States have sold or otherwise appropriated," etc. The act also contained the same provision as to lands reserved by Congress or otherwise, for works of internal improvements or other purposes.

The supreme court, in the case referred to, held that the proper construction of the granting act was as though Congress had said, "We give to the State certain land to aid in the construction of railways lying along their respective routes, provided they are not already *disposed of*, or the rights of settlers have not already attached to them when the routes are finally determined. If at that time it be found that of the lands designated any have been disposed of, or the rights of settlers have attached to them, other and equivalent lands may be selected in their place, within certain prescribed limits."

In continuation the court says:

It is to no purpose to say, against this construction, that the government could not grant what it did not own, and therefore could not have intended that its language should apply to lands which it had disposed of. As already said, the whole act must be read to reach the intention of the law-maker. It uses, indeed, words of grant, words which purport to convey what the grantor owns, and, of course, can not operate upon lands with which the grantor had parted; and therefore when it afterwards provides for indemnity for lost portions of the lands "granted as aforesaid" it means of the lands purporting to be covered by those terms."

The court then reviews the case of the Railroad Company v. Baldwin (103 U. S.), and that of Leavenworth, Lawrence & Galveston R. R. v. United States, (92 U. S.), and declares that neither of said cases, prop-

erly considered, presents antagonistic views; and that if the language in the last case must be so construed, it was mere dictum and not to be regarded.

This plain language of the supreme court in the Barney case seems to be conclusive of the questions presented; and to hold that lands, so reserved for works of internal improvements when found within either granted or indemnity limits, are not to be taken under the railroad grant; but if such lands are of the designated sections, within the primary or granted limits of the road, then the company is entitled to indemnity for all such lands, so lost to the grant.

The force of this clear exposition of the law in the Barney case is sought to be broken by the assertion that the grants to Minnesota, then being construed, were of the alternate odd numbered sections "of land;" whilst the grant to Wisconsin of 1864, is for the designated sections of "public land." It is claimed that there is, or ought to be, a distinction between the two grants, because of this want of identity in language; that in the Minnesota case the grant being "of land," it could be consistently held that Congress, as stated by the court, intended its beneficiary should have the designated quantity, if the same could be obtained within either the granted or indemnity limits. But that in the other case Congress intended only to give the designated quantity of land provided it could be found within the granted limits, and was at the date of the grant "public land;" that is, free and unappropriated; and that as to deficiencies in such land no indemnity was contemplated or granted. A discussion of this question is not necessary to a determination of the matters involved in this case.

By the act of 1856, entitled "An act granting *public* lands to the State of Wisconsin to aid in the construction of railroads in that state," is granted for this road "every alternate section of *land*, etc.;" subsequently the act of 1864, entitled "An act granting *lands* to aid in the construction of certain railroads in the State of Wisconsin," was passed, whereby was granted for the same road "every alternate section of *public land*," etc., and it is expressly stated by the terms of this last act that these additional sections are granted for the same purpose and "upon the same terms and conditions as are contained" in the original granting act. Thus Congress makes out of the public domain an original grant of land, and afterwards, also from identically the same public domain, and expressly and specifically for the *same* purposes, and upon the *same* terms and conditions, makes an enlargement of the grant; and in doing so employs, as it seems to me, the two terms, not as contradistinguished, but as denoting the *same* subject matter. If there be any force in the argument that the two terms in question have, as used by Congress in other places, a difference of meaning, it seems evident that in the title and all through these acts they are both interchangeably employed. So far as this case is concerned, therefore, the arguments and inferences based upon such differences of meaning have no application.

But independent of the foregoing, the grants under which the Omaha Company claims have been the subject of judicial construction. The matter was before the United States circuit court in Wisconsin in 1879, in the case of the Madison and Portage R. R. Company *v.* the State *et al.* Mr. Justice Harlan, of the U. S. supreme court, delivering the opinion in that case, said :

Some question has been made as to the precise extent of the grant under the two acts of Congress. We understand that it covers six sections in width on each side of the line, in the one case, and ten sections in the other, of lands in place as they existed on the ground, so that if any of these sections were fractional, or, from any cause, were not full sections, the State could not make up the deficiency from lands in the indemnity limits, because as to the lands in place the act operates by specific description ; but, when there was not land in place to meet the call of the grants, whether the deficiency was more or less, it was competent to supply it by sections from the indemnity limits.

It seems here is a judicial construction which leaves no further room for discussion. When questions relating to the construction of these grants were passed upon by your office, in respect to the claim of the Wisconsin Farm Mortgage Company, you declined to adopt the views of Mr. Justice Harlan, as stated. When the case of the Mortgage Company came before this Department on appeal, your action was reversed, and it was said, as to Judge Harlan's decision (5 L. D., 92):

Whether binding upon the Department or not, in the sense you refer to, it is a decision of very high and persuasive authority. If the question were one of doubt, the safer rule of administrative action would lead me to accept it as authoritative in the conduct of executive business, and to adhere to the practice heretofore and for so many years enforced. But in my view the case is free from doubt, and the decision of said court rests upon sound and well established legal principles.

When the matter of this grant came before this Department again (5 L. D. 511) the decision in the case of the Mortgage Company was referred to and approved, and you were directed to adjust the grant of the Omaha Company in accordance therewith. I see no reason for changing the views then reiterated.

I therefore reverse your action as to the denial of indemnity for the 44,782.42 acres, covered by the swamp land grant and internal improvements acts.

The next item to be considered is the deduction of 56,619.84 acres on account of the overlapping limits of the Wisconsin Central Railroad. The conflicting limits here alluded to are presumed to be along the main line of the Omaha road where it encounters the line of location of the Wisconsin Central, between Bayfield and the west end of Lake Superior, and which portion of road has not yet been built by the last named company.

It is stated by counsel for the Omaha Company that no claim is made by the Wisconsin Central to the lands thus found to be in the conflicting limits ; and as evidence of this fact reference is made to a formal

relinquishment thereto, by the Central Company, on file in your office. No mention is made of this relinquishment in your letter, but I have inspected the same and find it to be a surrender and waiver, in favor of the Omaha Company, on the part of the Central Company "of its right of whatsoever nature to claim or select any lands, lying within the overlapping limits" of the two roads under the grant to the State, and which lands are seemingly described with much particularity.

Inasmuch as the Central Company has not earned the lands along this part of its line by construction of its road, the assignment is of little value, in the present aspect of the case, as the right to the lands in the conflicting limits is one in which the interests of the government are more deeply involved than those of that company.

It is, however, claimed on the part of the Omaha Company that you erred in making said deduction, because said company having definitely located the line of its road prior to 1858, and withdrawal having been made of the indemnity limits for the purposes of the grant of 1856, at the time of the passage of the act of May 5, 1864, making the grant to the Wisconsin Central, the lands within said six and fifteen miles limits were "reserved" from the operation of the later grant, and that company has no right to come within those limits for the purpose of gratifying any portion of its grant. I think this position well taken, and that it can not be successfully assailed, either on principle or authority.

Section six of the act of 1864, under which the grant to the Wisconsin Central is made, as before stated, declares that any and all lands reserved, etc., by act of Congress, or in any manner, for works of internal improvements, or for any purpose whatever, "are hereby reserved and excluded from the operation of this act," and by the granting sections the right to indemnity for such lands—"reserved or otherwise disposed of"—is given.

The rule that lands reserved, or otherwise disposed of, are not to be considered as included in a subsequent grant by Congress, is as old as the land system itself; and is too firmly settled through a long line of decisions by the supreme court to permit of any question at this late day, and it would be a waste of time to quote authorities to sustain an assertion that ought not to be questioned. But the case of *Wolcott v. Des Moines Company* (5 Wall., 681) is so apposite to the one now under consideration that particular reference to it may be excusable.

In 1846 Congress made a grant of land to the State of Iowa for the purpose of aiding in the improvement of the Des Moines river, "from its mouth to Raccoon Fork," the lands granted were to be taken "in a strip five miles in width on each side of said river." A question arose whether this grant embraced lands along the whole length of the river or only up to the point where Raccoon Fork flowed into it. Pending this discussion the Land Department ordered a withdrawal from sale of the designated sections, both above and below Raccoon Fork. Subsequently, the question of the proper construction of the grant came

before the supreme court in the case of the Dubuque and Pacific Railroad v. Litchfield, 23 How. 63, and that tribunal held the grant did not extend above Raccoon Fork.

In the mean time, and in 1856, Congress made another grant of land to the State of Iowa for the purpose of aiding in the construction of certain railroads; and the granting act contained the same proviso, as hereinbefore quoted, as to lands "reserved" by Congress or otherwise for works of internal improvements, etc., being excepted from the operation of the grant. One of the roads under the grant to Iowa was located through the lands above Raccoon Fork, theretofore withdrawn for the benefit of the river grant; and the question in the Wolcott case was whether the lands within the former withdrawal could pass under the railroad grant, or whether they were excluded as "reserved" lands under the proviso. The court held, in effect, that inasmuch as the river grant had been decided not to extend above Raccoon Fork, the railroad company would have been entitled to the lands in question had it not been for the withdrawal made under the wrongful supposition they were embraced in the river grant, but that said withdrawal was such a "reservation" as, under the proviso of the railroad act, excepted the land from that grant.

Since this decision was announced in 1866, the court has specially reaffirmed it in some half dozen or more cases, in which the question was presented under different aspects. Besides, the same case and the doctrines therein enunciated have been incidentally affirmed in innumerable other cases, and I find nothing in conflict therewith.

I must therefore hold that the lands within the fifteen miles limits of the withdrawal under the act of 1856 were "reserved" from the grant under the act of 1864 in favor of the Wisconsin Central Company, and that the Omaha Company is entitled to the whole of the designated sections within the six miles limits, and to be indemnified for losses therein out of the designated sections within the fifteen miles limits, to the exclusion of the other company, as fully as though the grant to it had never been made.

The same act of 1864, which made the grant of ten sections in width to the Central Company, also made a like grant for the benefit of the road now owned by the Omaha Company; the effect of which grant to the last company, it is now claimed, was an enlargement, to the extent of four sections, of the original grant of 1856; that the title of said company to the enlarged quantity must be considered as taking effect, equally with the title to the less quantity, as of the date of the first act, both as to the United States and the Wisconsin Central Company; and consequently that any claims the latter company may have to lands within the ten or twenty miles limits of the grant of 1864 must be in subordination to the prior rights of the Omaha Company to lands within the same limits, which by virtue of the definite location of its road, followed by construction, took effect as of the date of the act

of 1856. The cases of the Missouri Kansas and Texas Ry. Co. *v.* Kansas Pacific Ry. Co. (97 U. S. 491) and of the United States *v.* Burlington and Missouri R. R. Co. (98 U. S. 333) are relied upon to sustain this position.

I can not concur in this view. The original grant of 1856, under which the Omaha Company now claims, was of the designated six sections, and of indemnity to be taken within fifteen miles, to aid in the construction of a continuous railroad from Madison or Columbus, westward, *via* Portage, to the St. Croix river, thence northerly to the west end of Lake Superior and to Bayfield. The act of 1864 broke the continuity of the road provided for in the former act, and granted the alternate odd numbered sections of land, for ten sections in width, with indemnity limits of twenty miles, to aid in the construction of a road from the St. Croix river to the west end of Lake Superior, with a branch to Bayfield; and in section two made a similar grant in aid of a road from Tomah to the St. Croix river, both grants stated to be upon the same terms and conditions as were contained in the said act of 1856, provided that no indemnity lands were to be selected under the act of 1864 in lieu of lands received under the act of 1856. And the third section of the act of 1864 made for the first time the grant of lands for the road now known as the Wisconsin Central. Now, the grant here was entirely different from that which was being considered by the supreme court in the cited cases in 97 and 98 U. S. Reports, *supra*. In those cases the act of July 2, 1864, amending the act of 1862 (12 Stat., 489), was being considered. The act of 1862 to aid in the construction of a railroad from the Missouri river to the Pacific Ocean made a grant of five alternate odd numbered sections per mile, to be taken within the limits of ten miles on each side of the road. The act of 1862 was amended by the act of 1864, "by striking out the word 'five,' where the same occurs and inserting in lieu thereof 'ten'; and by striking out the word 'ten' where the same occurs and inserting in lieu thereof the word 'twenty'." And the supreme court said in the case in United States *v.* Burlington & Missouri R. R. Co., *supra*:

Now the enlargement of the grant by the act of 1864 is not made by words of a new and additional grant, but simply by altering the number of sections granted and the distance from the road within which they are to be taken. The numbers in the first act, says the amendment, shall be stricken out and larger numbers substituted, so that the act of 1862 must thenceforth be read, at least as against the government and parties claiming under concurrent or subsequent grants, as though the larger number had been originally inserted in it. The Burlington and Missouri Railroad Company received its grant from the same act which declared that the act of 1862 in its grant to the Union Pacific should be thus read: it must therefore take its rights to the land subject to the claim of that company.

If the Wisconsin act of 1864 had amended the act of 1856 by providing that "six" should read "ten" and "fifteen" "twenty", the case would be exactly like those arising under the Union Pacific act, and

the contention of the Omaha Company would be sustained. But inasmuch as the act of 1864 does not thus amend the act of 1856, while in effect increasing the grant thereunder, I must hold as to the overlapping lands, derived under the respective grants, made by the act of 1864, the different companies must be regarded as tenants in common.

The next question to be considered is in relation to the deduction of 35,973.72 acres, made by you, because of the overlapping limits of the West Wisconsin Railroad Company.

As just stated, the act of 1856 made a grant of lands to the State to aid in the construction of one continuous road from Madison or Columbus, northwestwardly "to the St. Croix River or Lake, between townships twenty-five and thirty-one, and from thence to the west end of Lake Superior," etc. The grant was accepted by the State and the right to build the entire road and receive the benefits of the grant was conferred upon the Milwaukee and La Crosse Railroad Company in October of the same year. In March, 1857, with consent of the State, the right to build that portion of the road running northward from the St. Croix river to Lake Superior, together with the benefits of the grant, was transferred to the St. Croix and Lake Superior Railroad Company. This part of the road, after several transfers, finally passed into the hands of the Omaha Company, and the other portion of the road from Madison to the St. Croix river, after more numerous transfers, finally passed into the hands of the West Wisconsin Company.

The maps of the definite location of the entire line from Madison to the St. Croix River, and thence to Lake Superior, were filed at different times prior to July 17, 1858, but no part of the road was constructed prior to the passage of the act of May 5, 1864, except sixty-one miles between Portage and Tomah.

From the map showing the definite locations, transmitted with your letter, it appears that the road approaching the St. Croix River from Madison met the road from Lake Superior at River Falls, a point about seven miles east of the river; a single line was then continued in a southwesterly course to Prescott on the St. Croix River, in township twenty-six. The line of road to Lake Superior was located from River Falls northwesterly to Hudson, on the St. Croix River in township twenty-nine; and thence northerly to Lake Superior. Thus, by the map of definite location the road went to two points on the St. Croix river, but both within the prescribed limits.

The Omaha Company has constructed its road between Lake Superior and Hudson, and from the last point south and easterly to River Falls, a distance of about ten miles, but has not built to Prescott.

A few months after the passage of the act of 1864 the line of the West Wisconsin road was located anew. The former line to River Falls and Prescott was ignored and a more direct line, further to the north, was adopted between Tomah and Hudson, the latter being the terminus on the St. Croix river. On this line the West Wisconsin Company con-

structed its road; and it is understood that it is because of the lapping limits thus brought about—by the location of the Omaha Company in 1857 and that of the West Wisconsin in 1864—that the deduction of 35,973.72 acres is made by you.

When the line of a land grant railroad has once been definitely fixed by the filing and acceptance of its map, there is no authority to change that location except the legislative; and in the absence of a legislative sanction the action of the land authorities in allowing or recognizing such change can neither confer nor take away rights

In the case of the West Wisconsin there was an implied right conferred by the act of 1864 to make a new location thereunder. But whether such right was given by that act or not, it is unnecessary to discuss; inasmuch as such new location was made in 1864, and subsequently recognized and approved by Congress in the act of March 3, 1873 (17 Stat., 634). This act recites that, whereas the Commissioner of the General Land Office had neglected to withdraw from market the lands embraced in the grant for a road from Tomah to Hudson, "as soon as the West Wisconsin Railway Company had finally located its road and filed the map of such location," whereby the company had lost lands along said line, it shall be entitled to take indemnity therefor "from the vacant odd numbered sections from the southeastern part or portion of the indemnity limits of the former grant for the branch roads from said city of Hudson to Lake Superior." Now here is a clear recognition and approval of the new location of the road from Tomah to Hudson by the West Wisconsin under the act of 1864, Congress providing indemnity for losses under the new location to be taken within the withdrawn limits of "the former grant."

It being thus apparent that the second location of the road had the sanction of Congress, it follows as a matter of course that the former location was revoked in contemplation of law; and that all claim thereunder and the grant which authorized it, was abandoned by the West Wisconsin Company and thereafter ceased to exist; and the only rights that company can now have in the premises must be held to have been derived from the act of 1864 alone, and the new location thereunder. *Rights* under this act can not conflict with those derived by the Omaha Company under the grant of 1856, the location of 1858, followed, as it was, by construction of its road. So that in adjusting this portion of the grant, you have erred in making said deduction; and you will follow the rule herein laid down as to the conflicting limits of the Wisconsin Central road with that of the Omaha Company in the further adjustment which you are directed to make.

This suggests the inquiry as to what is the terminus of the Omaha Company on the St. Croix River? That company insists that under its map of 1858 its route was definitely fixed so as to go to both Hudson and Prescott—points fifteen to twenty miles apart on the river; whilst you, by the map transmitted, fix the terminus at the city of Hudson.

Neither the act of 1856 nor that of 1864 fixed the exact point on the river to which the road should be built; that of 1856 said, "to the St. Croix river * * * between townships twenty-five and thirty-one;" that of 1864 said, "from a point on the St. Croix river * * * between townships twenty-five and thirty-one, to the west end of Lake Superior," etc. It is apparent from this that some one point was intended within said limits and not several. The company says it is true its map carried the line to two points, but that Prescott, the furthest point, is its proper terminus. In this view I do not concur. In the first place, the company itself, by its own act has shown that it considers Hudson the proper terminus on the river, inasmuch as after this long lapse of years it has not constructed the road to Prescott, the other point. It is true it has constructed seven or eight miles of road beyond Hudson to River Falls, but that is in a direction away from Prescott, rather than towards it, and by no means indicative of a purpose to build a road to the latter place. Besides, having constructed the road to Hudson, a point on the St. Croix river, it is not competent for it to obtain land under its grant to any point further below on said river. This view is sustained by the ruling of this Department in the matter of the Atlantic and Pacific Railroad Company (4 L. D., 458). That company was authorized to build a road from the Missouri river to the Colorado river; "thence by the most practicable and eligible route to the Pacific." It filed a map of definite location, carrying the road to San Buenaventura on the Pacific Ocean, and at the same time a similar map carrying it thence to San Francisco, three hundred and eighty miles further north on the Pacific. Withdrawals were made under these maps.

But this Department held that while the act authorized the company to select its route to the Pacific, yet when the Pacific was reached at San Buenaventura the terminus was found, and it was out of the power of the Land Department, by accepting the map of definite location beyond that point, to extend the road further than the terminus fixed by law and thereby increase the grant of lands. Hence, the withdrawal made beyond San Buenaventura was revoked, as having been made without authority, and the lands therein ordered to be restored to the public domain. I think the two cases are alike, and should be dealt with in the same way.

A further reason is that Congress itself has given a legislative interpretation to the grant, which fixes the city of Hudson as the southern terminus of the road of the Omaha Company in Wisconsin. In the act of March 3, 1873, before quoted, it will be noted that Congress gave to the West Wisconsin Company the right to take indemnity for certain losses within the limits of the former grant for the branch roads "from the said city of Hudson to Lake Superior." Here Congress plainly and unequivocally recognizes Hudson as the southern and Lake Superior as the northern terminus of the grant. As I do not think the question admits of a doubt, I approve of the location of the southern terminus at Hudson as fixed by you.

It is observed that in the map transmitted, and by which you have made the present adjustment of the grant to the Omaha Company, you have changed the northern terminal lines of said road at Lake Superior. By the map of definite location filed in 1858 this terminal line was a due east and west course; by the new map the terminal line runs nearly a southwest and northeast course. The effect of this change, counsel for the company states, is to throw outside of the limits of the road 4,873.79 acres of land on the west side of the road and include as much of the waters of Lake Superior on the northeast. It is also stated that the lands now thrown outside by this change were nearly, if not all, certified to the State many years ago.

You do not specially refer to this change of the terminal limits in your letter, but you state therein that the map and the adjustment were made in accordance with the principles announced in the departmental decision in the matter of the Northern Pacific terminal limits (5 L. D., 459) and in the case of *Leander Scott v. Kansas Pacific Railway Company* (ib., 468).

I think you have misapprehended both of those decisions, if they have led you to the adoption of the terminal line of your map. In the case of the Northern Pacific, the Acting Commissioner had directed that the general course of the whole length of the line of the road from Spokane Falls to Wallula Junction—a distance of one hundred and ninety miles—should be adopted and a line drawn at right angles therewith for the terminal line at that point. The decision held this to be error, and approved of the revocation of the action of the Acting Commissioner, and the opinion was expressed that the general course of the last twenty-five miles should have been taken and a line drawn at right angles thereto.

It should be observed, however, that here the Department was not passing upon the adjustment of "terminal" lines in the sense that they are applicable to the end or extremity of the road. Wallula Junction was not the end of the Northern Pacific road; it was a point to which the road had been constructed on the way to Puget Sound, the terminus or extreme end to which its charter authorized it to go. And this Department held in adjusting the terminal line at the point to which the road was constructed, the rule of adjustment, for the purpose of issuing patents, during the construction of the road, prescribed by the fourth section of the granting act, should be followed, and the terminal lines at the end of construction "should be run at right angles to the general course of the last twenty-five miles of the road." This was exactly in harmony with the provisions of the statute.

In the *Scott* case, the principles upon which railroad grants should be adjusted were most carefully considered. And though the question, on which that case came before the Department, related more particularly to the lateral limits of the road, the principles therein declared are such that they should settle all questions as to the adjustment of both lateral and terminal limits in the sense that the last expression is appli-

cable to the end of a road. It makes the actual road, as located and made, the object and measure of the grant, and the base of its locality; and says that none other must be adopted. With the road thus clearly fixed, lines drawn "perpendicular to it at each end," as was said in *United States v. Burlington Railroad Company*, 98 U. S., 40, will determine the final limits without mistake or difficulty. This course you have not followed, but have improperly fixed the said lines in accordance with the general direction of the last twenty miles of the road. And in doing this you have changed the limits as adopted and fixed by the map of definite location thirty years ago. This should not be, and you will therefore readjust the grant in accordance with the former terminal lines.

The next item to which objection is made is the deduction of 23,015.38 acres, because of lands approved to the Wisconsin Farm Mortgage Company, under the act of 1856. You say this deduction is made because the act of 1864 expressly prohibits the selection of lands in lieu of lands received under the provisions of the act of 1856. The provision of the act of 1864 referred to is that no "Selection or location be made in lieu of lands received under the said grant of June 3, 1856, but such selection or location may be made . . . to supply any deficiency under said grant of June 3, 1856, should any such deficiency exist."

The history of the Wisconsin Farm Mortgage Company and of its claim, is to be found in, 5 L. D., 81, where its right to the lands here referred to was passed upon. That case shows that sixty one miles of the road between Portage and Tomah, were constructed under the act of 1856, and prior to the passage of the act of 1864; that the Mortgage Company became entitled to the portion of the land grant thus earned, and that there not being sufficient land in either granted or indemnity limits, opposite the constructed piece of road to satisfy its claim, it was allowed to select from the indemnity limits north of the St. Croix river.

It seems to me that the Omaha Company has not sought to make selections in lieu of lands which passed to the Mortgage Company, or the State, under the grant of 1856; but has only made selections for lands which it had earned, and was not able to find in place. That in thus seeking to satisfy its grant in the mode pointed out by law, the Omaha Company should have its indemnity selections cut down, because the State theretofore made other indemnity selections under the same grant, for the Mortgage Company, in the same indemnity limits, and for another portion of the road, is an entire misapprehension and a perversion of the proviso referred to. I therefore reverse your action on this point.

You have also deducted from the amount claimed by the Omaha Company, 3,398.57 acres, on account of lands erroneously approved to the Bayfield branch of said road; and the amount of 883.46 on account of lands similarly certified to the West Wisconsin Company.

I assume the lands included in these two deductions, were lands in place, wrongly certified as above, since the definite location of the road of the Omaha Company. This being so, it is an unfortunate condition of affairs for that company, since there is no law which contemplates the allowance of indemnity for such a wrong. The remedy for the wrong must be obtained through the courts. The certifying, approving, or patenting of lands, within the granted lines of one road to another company, being entirely without authority of law, gave no title to the latter company, and such action would be set aside by the courts of the United States. I must therefore approve your action in relation to these two deductions. But I may suggest that, inasmuch as the Omaha Company owns the Bayfield branch, and, I am informed, also the West Wisconsin road, the error may be rectified by a reconveyance to the United States of the lands erroneously certified, when the Omaha Company could obtain its rights.

The last deduction in your statement, is of forty acres, on account of land sold by the United States subsequent to definite location of the Omaha road. This is another wrong, for which the act does not authorize the allowing of indemnity and therefore it was your duty to make the deduction. I see no means of righting the wrong, except through an appeal to the courts, if by use of the word "sales" in relation to this item you mean that said tract was sold at private entry. But if you mean it was purchased under the pre-emption law, under the commutation clause of the homestead law, or under the second section of the act of June 15, 1880, (21 Stat., 237), then indemnity could be allowed the company under the provisions of the act of June 22, 1874, (18 Stat., 194).

I have thus passed upon all the deductions made by you from the claim of the company, and direct that you will at once readjust its grant in accordance with the views herein expressed.

In so far as the rulings herein are applicable to the Bayfield branch, it is intended you shall follow them in the adjustment thereof, which you will make at the same time as that of the main line.

RAILROAD GRANT—LOCATION AND CONSTRUCTION—INDEMNITY.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RY. CO. (BAYFIELD BRANCH.)

Deviations in the construction of the road from the line of definite location, rendered necessary to avoid engineering obstacles or remedy defects in the original location, not destroying the identity of the road constructed with the one located, and confined within the limits of the grant, will not defeat the right of the company to the lands conferred by the grant.

The first section of the act of May 5, 1864, provides for the selection of indemnity in lieu of such lands as are found at definite location to be reserved, and, under such provision, lands within an Indian reservation at date of definite location constitute a proper basis for indemnity.

The sixth section of said act must be construed to mean that "reserved" lands cannot be taken either for granted or indemnity purposes, or their status in any way affected by anything in the act; and further that said section in no way conflicts with the first section which allows indemnity for all "reserved" lands.

Secretary Lamar to Commissioner Sparks, October 7, 1887.

I have considered the matter of the adjustment of the Bayfield Branch of the Chicago, St. Paul, Minneapolis and Omaha Railroad, as disclosed by your letter of September 12, 1887.

With two exceptions, all of the matters contained in said letter have been passed upon by me, in the matter of the adjustment of the grant along the main line of said road; and you will follow in the adjustment of the Branch line the principles declared and instructions given in my said decision of even date herewith.

One of the exceptions is referred to in your letter and is stated to be the failure of the company to construct its road upon the line of definite location. You mention one such deviation in towns 44 and 45 N., range 7 W., of at least three miles; another in towns 45 and 46 N., range 6 W., of about four miles, and another, commencing in town 47 N., range 6 W., diverging in a northeasterly direction to Lake Superior in town 48 N., range 5 W., thence along the lake shore to Bayfield in town 50 N., a distance of fifteen or twenty miles, "the two lines for the greater portion of the distance being about eight miles" apart; and you say, "In my opinion these deflections are fatal to the company's claim for lands opposite the portions of the road where the deflections occur."

When the line of a land grant railroad is once definitely located by the filing with and acceptance of its map by the Land Department, neither the company, the Department, nor both together, can change the line of the road as thus located, and it must be constructed in accordance therewith, unless Congress authorizes a change. *Van Wyck v. Knevals*, 106 U. S., 366; *Central Pacific R. R. Co.*, 5 L. D., 661. Whilst the law has adopted this rule, every deflection or deviation from the exact line of the map is not to be regarded as a change of route to the extent of being an unfixing of that which had been "definitely fixed."

In the case just referred to in 106 U. S., one of the grounds on which the right of the railroad company to the lands in controversy was sought to be defeated was, "that after filing its map with the Secretary of the Interior, it changed for part of the distance the route of the road." The deflection complained of was from one to three miles for seventy-five miles. In relation to this the court says:

As to the alleged deviation of the road constructed from the route laid down in the map, admitting such to be the fact, the defendant is in no position to complain of it. The lands are within the required limits, whether that be measured from one line or the other. A deviation of the route without the consent of Congress, so as to take the road beyond the granted limits, might, perhaps, raise the question whether

the grant was not abandoned; but no such question is presented. The deviation within the limits of the granted lands in no way infringed upon any rights of the defendant.

From the foregoing extract, it is apparent that the supreme court did not regard a deviation in the construction of the road from the line marked on the map as a matter which required the consent of Congress, so long as such deviation or deflection did not "take the road beyond the granted limits." In the present case the deflection is nowhere over eight miles from the line of location, whilst the granted limits are ten miles on each side thereof.

The case of *Van Wyck v. Knevals*, *supra*, was decided at the October term, 1882, of the supreme court; but prior to that time this Department had made substantially the same ruling in certainly three cases.

The first of these cases arose under the act of May 12, 1864 (13 Stat., 72), making a grant of lands to Iowa, for the benefit of the McGregor Western Railroad Company. The road as constructed deviated from one to five miles from the line of definite location, but did not go outside the granted limits. The matter was referred by this Department to the Attorney General, who, on February 2, 1880, gave his opinion (16 Ops. Atty. Gen., 457), in which he held substantially that, in order to entitle the State to the benefit of the lands granted, it is necessary that the road should be constructed according to the line of definite location. If a different road be constructed than that definitely located, the State would be entitled to nothing under its grant. But whether the road as constructed is or is not the road as definitely located, it was held, is a question for the Interior Department to determine, and was one largely within the discretion of the Secretary. On this point the opinion continues—

Some deflections must in many cases be expected from the line of the road as definitely located; but it is for the Department to determine whether or not these make of it a different road, or whether there is substantial compliance with the line of definite location. In the exercise of this discretion it is impossible to lay down any legal rules which could govern all cases. . . . I would suggest that, if the deflections be in their character immaterial—if they were made for the purpose of avoiding engineering obstacles, which could not otherwise be avoided without exaggerated expense, or to remedy defects in the original location—that such deflections would not destroy the identity of the road constructed with the road of definite location.

In adjusting the grant, he held that it must be done in accordance with the line of definite location, and not that of construction.

Concurring in the views of the Attorney General, Secretary Schurz investigated the facts in connection with said deflections, and found that the line of definite location had been hastily surveyed in mid-winter, upon the imperative demand of the Land Office for the immediate filing of a map; that in the haste and with the ground covered by snow it was impossible to select the best route; that a deflection was made in order to find a better crossing of the fork of the Des

Moines river; that another deflection was to avoid a high hill; at another point to avoid a long elevated range, and at another to correct a mistake in the original survey; that the line adopted was the most practicable and most beneficial to the community, whilst the located road would be attended with undue expense both in construction and operation. Finding these facts, the Secretary was of opinion—April 9, 1880—"that the identity of the road is not destroyed by the deviations in construction from the original line, and that the State is entitled to have patents for the granted lands. (Land Office Report, 1880, 122).

On April 17, 1880, but a few days after the decision just cited, Secretary Schurz made a similar ruling in the case of the Hastings and Dakota Railroad (*ibid.*, 123). The deviations were in some places three to four miles, and in other six to seven, and the constructed line for some distance ran north of the Minnesota river, whilst the line of location followed the southern bank. The facts showed that the located line crossed a very rough country of deep gorges and ravines; ran along bottoms where trestle work and bridging were necessary; crossed the river where an expensive bridge would be required; and also other bridges and embankments, which were liable to be washed out by overflows—all of which would entail upon the company an enormous expense, both in constructing and operating the road. On these facts, it was held that "the deviations in question can not justly be objected to, or held to destroy the identity of the road," and the lands were directed to be certified in satisfaction of the grant.

On June 10, 1880, a similar ruling was made in the case of the St. Paul, Minneapolis and Manitoba Railway Company, St. Vincent's Extension (*ibid.*, 124). The location was made for several townships through marshes and swamps, which at the time of the survey were dry and through which the engineers then thought a road was entirely feasible. Afterwards it was found that these swamps, for a greater portion of the year, were usually several feet under water, and that earth to make the necessary embankments through them must be hauled a long distance. A deflection was made for a distance of nearly eighty miles, which was at points as wide as the granted limits, and the trouble was avoided. The Secretary held that the road as constructed was the one "contemplated by the grant and withdrawals," and that the deflections became necessary in order to avoid engineering obstacles, which could not be otherwise overcome, without exaggerated expense, or to remedy defects in the original location"; and the State was awarded patents for the granted land.

The facts in the case now being considered are in many respects similar to those in the recited cases.

It appears from papers on file that on May 29, 1856, after the passage of the act of June 3, 1853, under which the company claims its first grant, but before its approval by the President, the lands along the

supposed route of the road were withdrawn, from sale and settlement, by telegram from the land authorities, which withdrawal was subsequently continued by letter of June 12, 1856; that subsequently on March 2, 1858, the St. Croix and Lake Superior Railroad Company, on which the State of Wisconsin had conferred that portion of the grant between the St. Croix river and Lake Superior, presented to the General Land Office a map of definite location of the road from Hudson on the St. Croix river to the west end of Lake Superior; and for the branch line as far north as the north boundary of town 44 N., range 7 W. This map was not accepted, the Commissioner being of opinion that the granting act provided for a road from the St. Croix river to the west end of Lake Superior and *thence* to Bayfield.

My predecessor, Secretary Thompson, held otherwise, and thought a branch to Bayfield, south of Lake Superior, was authorized; but he was of the opinion that the point of divergence indicated for the branch line was too far south. Application was made, March 27, 1858, to the Commissioner to accept the map as showing the route as far as located, and that, until the survey to Bayfield could be completed by the company, there be an extension of the time, along that line, set in the public notice for restoration of the lands to sale and settlement. It was promised the map of the completed route should be forwarded in one hundred and twenty days. On April 1, 1858, the Governor of Wisconsin was informed that the map presented could not be accepted as the location of either main or branch line, because the location of the latter was not complete, "a partial location can not be considered." No reply was made to the application for extension of time. Under these circumstances, the company felt itself compelled to make haste in its efforts to have its maps on file prior to the time fixed for the restoration of the lands to sale and settlement. The maps were filed July 17, 1858, accepted by the land office, and withdrawals thereunder made; the point of divergence for the branch line being fixed some twelve miles further north than in the first map.

In the course of time the land grant passed to the North Wisconsin Railroad Company, and finally to the present owners of the road, the Chicago, St. Paul, Minneapolis and Omaha Company.

When construction upon the branch line was about to commence, it was found by a more careful examination that the line as located on the map was, if not impracticable, so beset by engineering difficulties, requiring such a vast outlay of money, both in the construction of the road and its subsequent management, as to render it almost unprofitable to the company, and greatly to impair its usefulness to the country it was designed to benefit. Under these circumstances, application was made to the Secretary of the Interior for permission to change the route of said branch line further to the eastward, but Secretary Kirkwood stated that he was not clothed with authority to allow the change of the line of definite location of the road in advance; but that if when the road

was constructed, it was found that engineering difficulties had caused a mere deflection from the located line, such action, if within proper bounds and for proper reasons, would be approved as had been done in similar cases, if the road constructed was found to be built in substantial compliance with the granting act, and its identity had not been destroyed by the deflections. The road thereafter was fully completed, and for some years past has been in regular operation.

Without going at length into the details of the whole showing made by the papers on file in the case, it is sufficient to refer to some of them. It appears that the survey, made prior to the filing of the map of definite location, from Bayfield south to town 44, about fifty miles, was made within twelve days, and it is within these fifty miles the engineering difficulties are encountered. Profile and topographical maps show that the line was located along a series of ridges, covering the country between town 44 N. and Bayfield, which are five hundred feet above the level of Lake Superior.

Estimates of the engineering officers of the company show that to build on the located route would require a grade of at least eighty feet to the mile; that much excavation and bridging would be required, costing over one million and a half dollars; also a tunnel costing over two millions and a half dollars; and that the estimated difference in the two routes would be over four and a half millions of dollars. Besides this, the grade of eighty feet to the mile, nearly double that of the constructed route, would almost double the operating expenses of the road, and be not only burdensome to it, but to the community for whose benefit it is intended.

Under these circumstances, which are made to appear satisfactorily to me, I am of opinion that the company is entitled to the lands conferred by the grant.

In your adjustment of the branch line you deduct 9,296.92 acres because of that amount of the Lac Court Oreille Indian Reservation found to be within the granted limits under the act of May 5, 1864 (13 Stat., 66); which Indian reservation you hold was excluded from said grant and no indemnity should be allowed therefore.

There was no Indian reservation along the main line of said road and nothing was said specially in regard to such reservation in the opinion adjusting the grant for that line, and this subject of the Indian Reservation therefore constitutes the second exception referred to on the first page hereof.

Whilst it is true Indian lands were not mentioned *eo nomine* in the other decision what was there said in relation to "reserved" lands will apply with equal force to lands within an Indian Reservation. For the fact that such reservation has been made does not place the lands therein in a different category from lands otherwise reserved, disposed of or appropriated so far as the operation of the grant upon them is concerned.

The Leavenworth Lawrence and Galveston case (92 U. S., 747) is specific in relation to this point, which was properly before it, the very question at issue being whether land in an Indian Reservation passed under that grant. The language used in the opinion of the court is:

Every tract set apart for special uses is reserved to the government to enable it to enforce them. There is no difference, in this respect, whether it be appropriated for Indian or other purposes. There is an equal obligation resting on the government to require that neither class of reservations be diverted from the uses to which it was assigned.

This being so, there ought to be no necessity for further discussion of the subject. But if there should be a doubt a careful and candid examination of the granting act of 1864 ought to remove it. The grant is for "every alternate section of public land designated by odd numbers for ten sections in width on each side of said road." And it further provide: "But in case it shall appear that the United States have when the line of said road is definitely fixed, sold, *reserved* or otherwise disposed of any sections or parts of sections granted as aforesaid" then the company may select as much land "as shall be equal to such lands as the United States have sold or otherwise appropriated" etc.

Now there seems to be no room for doubt as to the meaning of this first section which says if, at the time of the definite location, it shall appear that the United States have "reserved" any sections then lands are to be selected in lieu of the lands thus "appropriated." This is plain. It puts no limitation whatever upon the declaration; it does not say that Indian Reservations are not to be regarded as lands "reserved" by the United States; or that indemnity shall not be granted for lands lost because of Indian Reservations. It simply says that for all lands "reserved" to the United States there shall be indemnity. I do not see that the plain purpose and meaning of this section of the act can be made more clear than its own language makes it.

I hold it then as beyond question that under this first section standing alone, the company is entitled to select indemnity lands for such within the granted limits, as are found at the date of definite location, to be "reserved"; and that the Indian lands in question were in that category. Is there anything in the other provisions of the act to change or qualify this declaration?

It is asserted that the sixth section does materially change the provisions of the first and precludes the allowance of indemnity for lands within the Indian Reservation. That section is copied and reads as follows:

That any and all lands reserved to the United States by any act of Congress for the purpose of aiding in any object of internal improvement or in any manner or for any purpose whatsoever, and all mineral lands be and the same are hereby reserved and excluded from the operation of this act, except so far as it may be found necessary to locate the route of such railroads through such reserved lands.

The first section grants the odd numbered sections of land in place along the road within certain limits; the sixth section says, but if any

of said sections are "reserved" they are not granted. The sixth section is therefore a limitation upon the grant; a proviso that "reserved" lands shall not be taken. Being a proviso it must be strictly construed.

In the case of *United States v. Dickson* (15 Peters 141) the supreme court through Mr. Justice Story says it is

the general rule of law which has always prevailed, and become consecrated almost as a maxim in the interpretation of Statutes, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced that proviso is construed strictly and takes no case out of the enacting clause, and those who set up any such exception must establish it as being within the words as well as within the reason thereof.

Applying this rule to the sixth section we find that it plainly declares that lands reserved "for any purpose whatsoever" are excluded from the operation of the grant, and this is all. Not one word about indemnity; so that subject is certainly not within the "words" of the act.

In addition to what was said in the *Barney* case 113 U.S., about this proviso, or rather one exactly similar in the act then being considered, the supreme court in the *Leavenworth Lawrence and Galveston* case *supra* also had under consideration as said before, a section containing the same language.

In that case lands, which were in an Indian reservation at the date of the grant, but which had subsequently been released therefrom, were taken as indemnity lands by the railroad company and suit was brought by the United States to declare title to be in the government. The court sustained the claim of the government and in so doing declared that the proviso was not necessary to reserve Indian lands from the operation of the grant, because such lands having been previously appropriated or reserved, subsequent laws did not affect them. Said the court:

That lands dedicated to the use of the Indians should upon every principle of natural right, be carefully guarded by the government and saved from a possible grant, is a proposition which will command universal assent. What ought to be done has been done. The proviso was not necessary to do it; but it serves to fix more definitely what is granted by what is excepted.

According to the view of the court the proviso introduced no new matter or element into the granting act, nor took anything out that was in there before; it simply emphasized, strengthened, and made more plain that which went before.

Now if the act itself did all the proviso does, if, in other words there was no necessity for the proviso, it must be apparent there is nothing in it which was intended to conflict with or alter the granting clause and the two must be read together in harmony, and not in discord. If indemnity is not to be granted for lands within an Indian reservation, then we must hold that the proviso does conflict with and repeal *pro*

tanto the first section when it says indemnity is to be allowed if it appears that *any* of said land has been "reserved," and hold that the proviso carves all Indian reservations out of the indemnity provisions. On the other hand if we read the proviso in harmony with the rest of the act, as we are bound to do by every canon of construction, by the authority of the Barney case and that of the last cited, and, it may be added, by, what seems to me to be, its very plain text, we must hold the proviso simply to mean that "reserved" lands cannot be taken either for granted or indemnity purposes, or their *status* in any way interfered with by any thing in the granting act; and further that the proviso in no way conflicts with the first section allowing indemnity for all "reserved" lands.

Concurring in this harmonious reading of the whole act, I reverse your action disallowing indemnity for lands within the Indian reservation; and direct such indemnity to be allowed; and further, that the grant along the branch line be readjusted in accordance with the views herein expressed and those in the decision as to the main line.

TIMBER CULTURE ENTRY—LAND DEVOID OF TIMBER.

JAMES SPENCER.

The preliminary affidavit required of the entryman contains the statutory definition of the character of land subject to timber culture entry, and, under such definition, the presence of a natural growth of timber on a section precludes entry therein.

Recognizing the former departmental rulings the application herein will be received, but in the allowance of entries hereafter the rule, as above enunciated, must be followed.

Acting Secretary Muldrow to Commissioner Sparks, October 11, 1887.

August 1, 1884, James Spencer presented timber culture application for the NE. $\frac{1}{4}$ of Sec. 14, T. 3 S., R. 22 W., Kirwin, Kansas, at the same time tendering fees and commissions.

This application was rejected by the local officers because the township plat showed timber in the section. By decision dated May 23, 1885, your office affirmed the rejection. Appeal from this decision brings the case here.

It is shown by the record that three-quarters of this section are entirely devoid of timber. On the NW. $\frac{1}{4}$ is a ravine where there is timber scattered over about one acre, and described by claimant as follows:

From actual count there is about fifty scrubby elm and cottonwood trees in said section, twenty of which average about twenty inches in diameter, twenty of same kind that will average about twelve inches, and about ten that will average about eight inches in diameter. The tallest of said trees is not over fifty feet high.

Under the ruling of this Department, in force when the application of Spencer was made, it should have been allowed. See the case of

Blenkner v. Sloggy (2 L. D., 267), where the entry was allowed, although there were on the section "about five hundred trees of natural growth, varying in diameter from six inches to two feet or more, and consisting of ash, oak, elm, and some under-brush," scattered over from five to eight acres. See also *Box v. Ulstein* (3 L. D., 143), and many others, including the late case of *Bartch v. Kennedy* (id., 437), adhered to on review March 30, 1885, where there were on the section "from five to six acres of trees of different kinds, probably 1200 in number."

Your office decision is reversed, and said application will be allowed to go to record.

Now, while the application herein is allowed because made when the departmental ruling permitted its allowance, I am clearly of opinion that said former ruling is entirely too liberal and is not in harmony with the statute. The timber culture law requires the entryman before making entry to file an affidavit setting forth, among other things, that the section of land specified in his application is composed of *prairie lands or other lands devoid of timber*. Under this statute, it can not be reasonably contended that a section is "devoid of timber" when upon it there is a *natural growth* of timber, as was the case in *Blenkner v. Sloggy* and other leading cases under the former ruling. "Devoid of timber" necessarily means: "Without timber"; or "destitute of timber"; and does not mean, what was held in the old ruling, especially in the case of *Bartch v. Kennedy* (*supra*), viz: That if the section contains a less quantity of timber than that required to be grown by an entryman of one hundred and sixty acres to entitle him to patent, at least one hundred and sixty acres of it is subject to entry under the timber culture law.

The former ruling on this subject will not be allowed to prevail longer. Timber culture entries made after the date of this decision must be made of land, in the language of the statute, "devoid of timber." Entries allowed under the former ruling, in which the law in other respects has been complied with, will not be affected by the ruling as herein announced.

MINERAL LAND—PRACTICE—SALE BEFORE FINAL CERTIFICATE.

MAGALIA GOLD MG. CO. v. FERGUSON.

The filing of an appeal operates as a withdrawal of a pending motion for a rehearing. The mineral character of the land as a present fact is an essential matter of proof where it is sought to defeat an agricultural entry upon land returned as subject thereto.

Inasmuch as the final proof shows compliance with law the patent may issue, although the land was sold before the issuance of final certificate.

Acting Secretary Muldrow to Commissioner Sparks, October 11, 1887.

I have considered the case of the Magalia Gold Mining Company v. Andrew J. Ferguson, as presented by the appeal of said company from

the decision of your office, dated June 2, 1886, holding that the proof fails to show that the NW. $\frac{1}{4}$ of Sec. 24, T. 23 N., R. 3 E., M. D. M., is mineral in character.

The record shows that the township plat of survey was filed in the local land office on August 2, 1869, and said tract was returned by the surveyor general of the United States as agricultural in character. On May 23, 1881, said Ferguson made homestead entry No. 3000, of said tract, and on September 6, 1882, gave due notice of his intention to make final proof on October 7th following. On September 15, 1882, said company filed in the local land office affidavits, alleging that said tract was mineral in character, and asked that a hearing be ordered to determine the character of the land. On the same day notice was issued to the attorneys of said parties, requesting them to stipulate the time, place and officer before whom the testimony should be taken.

On October 7, 1882, said Ferguson appeared, with his witnesses, before the officer designated in the published notice and made satisfactory proof of compliance with the requirements of the homestead law as to residence and cultivation of said tract for a period of more than five years. On October 23, 1882, by stipulation in writing November 13, 1882, was fixed for the taking of testimony, at which time both parties appeared and submitted their evidence.

The local land officers considered the proof offered and decided that the land was not shown to be mineral in character, and that the homestead claimant should be allowed to make final entry upon the proof already submitted.

On appeal, your office on August 2, 1883, affirmed the decision of the local land officers.

On December 5, 1884, this Department (3 L. D., 234), considered the case on appeal, and held that a rehearing should be had at the expense of the mineral claimants. The rehearing was duly had, and the local land officers again found that the evidence was not sufficient to set aside the return of the surveyor general, and that the tract was agricultural in character. On appeal, your office on June 2, 1886, held that the testimony taken at both hearings shows that in November, 1882, the company was mining on the SE. $\frac{1}{4}$ of Sec. 13, in said township, and within about five hundred feet of the north line of the tract in controversy, the lead trending southward; that since the last hearing, a period of three years, the lead has approached said tract in dispute for a distance of only fifty to one hundred feet; that no mineral has been found on said tract, and that the same is shown to be valuable for agricultural purposes.

On August 9, 1886, the company filed in the local land office a motion for a rehearing of your said office decision, dated June 2, 1886, based upon certain affidavits filed therewith, and on the same day filed an appeal from said decision of your office. The filing of said appeal was in effect a withdrawal of the motion for a rehearing. *W. F. Hawes et al.* (5 L. D., 438).

It will be quite unnecessary to comment in detail upon the voluminous testimony taken in the case. I concur with the findings of the local land office, and of your office that the evidence does not show that said land is mineral in character, and that the return of the surveyor general is incorrect. No mineral in paying quantities has been found upon the land in question, and under the repeated decisions of this Department "it must appear not that neighboring or adjoining lands are mineral in character, or that that in dispute may hereafter by possibility develop minerals, in such quantity as will establish its mineral rather than its agricultural character, but that as a present fact it is mineral in character." *Cleghorn v. Bird*, and cases cited therein (4 L. D., 478); *Commissioners of King Co. v. Alexander et al.* (5 L. D., 126).

Although the evidence fails to show that said tract is not agricultural in character, it is shown by the proof that said Ferguson is dead, that prior to his death, to wit, on December 15, 1883, he sold the Aurelia Placer Mining claim, embracing said tract to one William Gregory; that on the same day, to wit, December 15, 1883, said Ferguson conveyed to William Gregory for the sum of one thousand dollars said NW. $\frac{1}{4}$ of said section, and at the date of the rehearing in said case, said Ferguson had no interest whatever in said tract.

While it is true that the final certificate was not issued, yet the final proof showed that the entryman had complied with the requirements of the homestead law, and I see no reason why the final papers may not now issue and the entry pass to patent. The decision of your office is affirmed.

MINING CLAIM—STATUTORY EXPENDITURE.

EMILY LODE.

Improvements, made outside the surface boundaries, may be considered in determining whether the law requiring the expenditure of five hundred dollars on the claim has been complied with, where it appears that such improvements were made to facilitate the extraction of ore from said claim, and are not included in improvements upon any other claim.

Acting Secretary Muldrow to Commissioner Sparks, October 11, 1887.

I have considered the appeal of the American Antimony Company, from the decision of your office dated February 1, 1886, holding that the evidence of improvements upon the Emily Lode claim, mineral entry No. 986 is insufficient.

The record shows that said entry was made at the Salt Lake land office, in the Territory of Utah, on December 27, 1883. On February 1, 1886, your office examined the papers of said entry, and, among other things, advised the local land officers that the improvements certified by the surveyor general upon said claim, consist of "an open cut twenty feet by six feet, a trail three fourths of a mile in length, a road one mile

long, and a cabin worth seventy five dollars"; that no itemized statement of the value of said improvements, except as to the cabin, was given; that it was not shown what portions of the tract and road were upon said claim; that no credit could be given for any part of said trail and road which lie outside of the exterior boundaries of said claim; and that a new certificate of the surveyor general must be furnished, showing the location and value of each improvement made upon said claim, and also stating in what way the trail and road upon the claim were used for its improvement, and for what purpose the cabin was used.

On May 13, 1886, the local land officers transmitted a new certificate of the surveyor general, dated April 5, 1886, with a request of the attorney of said company, asking a reconsideration of said decision, and in case your office declined to revoke its said decision, that said motion be considered an appeal from said decision to this Department on the grounds stated in the motion. On June 14, 1886, your office refused to reconsider its said decision, and transmitted the papers to this Department.

The second certificate of the surveyor general states that:

The labor done and improvements made on the Emily lode Lot No. 42 by the claimants or their grantors, exceeds five hundred dollars in value, which improvements consist of an open cut at the said Emily discovery, 20 feet by 16 feet five feet deep, worth not less than \$250.00; a trail three fourths of a mile in length, worth \$75.00, a good wagon road one mile long, worth \$250.00, and a log cabin worth \$75.00. The above cut was made in rock to facilitate the extracting of the ore. The trail and road was built to carry the ores from the claim to the company's smelter, located on the Albion Mill site and is not included in any improvements upon any of the other claims belonging to the claimants. The said trail and road run from the discovery of the Emily Lode in a northerly direction, and only a small portion actually lies within the surface boundaries of said Emily Lode, but was used for the development of the same. The cabin was built to accommodate the miners working upon the claim.

The sole question presented by the appeal is, can the improvements made outside of the surface boundaries of the claim as shown by said certificate, be considered as a part of the five hundred dollars required to be expended upon the claim?

It is insisted by the appellant that your said office decision adverse to the claim of the company is erroneous, and as authority, in support of its contention, are cited the cases of *Smelting Company v. Kemp* (104 U. S., 636) and *Jackson v. Roby* (109 U. S., 440). Section 2325 Revised Statutes, provides, that the claimant at the time of filing his application, or at any time thereafter, within the sixty days of publication, "shall file with the register a certificate of the United States surveyor general, that five hundred dollars worth of labor has been expended, or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments, as shall identify the claim, and fur-

nish an accurate description to be incorporated in the patent." This provision is substantially embodied in paragraph 37 of the mining regulations approved September 23, 1882.

In the case of the Smelting Company *v. Kemp* (*supra*), the supreme court of the United States considered the question of expenditures before the issuance of a patent and held that:

Labor and improvements within the meaning of the Statute are deemed to have been had on a mining claim whether it consists of one location or several, when the labor is performed or the improvements are made for its development, that is, to facilitate the extraction of the metals it may contain, though in fact such labor and improvements may be on ground which originally constituted only one of the locations, as in sinking a shaft, or be at a distance from the *claim itself*, as where the labor is performed for the turning of a stream, or the introduction of water, or where the improvement consists in the construction of a flume to carry off the debris or waste material.

Subsequently in the case of *Jackson v. Roby* (*supra*), the court quoted the above paragraph and said "the contention of the plaintiff was made upon a singular misapprehension of the meaning of the act of Congress, where work or expenditure on one of several claims had in common, is allowed in place of the required expenditure on the claims separately. In such case, the work or expenditure must be for the purpose of developing the claim."

In the case of *Kramer v. Settle* (1 Idaho), the court held that "work done outside of a mining claim and with direct reference to the claim, may be considered as work done on the claim," but that "the evidence of such work should be received with great caution, and it should appear clearly that such work was intended for the improvement of such claim and no other."

Again, the supreme court in *Chambers v. Harrington* (111 U. S., 350) quoted with approval from the opinion of the court in the case of *Mount Diablo M. & M. Company v. Callison* (5 Sawyer 439) saying: "Work done outside of the claim or outside of any claim, if done for the purpose and as a means of prospecting or developing the claim, as in case of tunnels, drifts etc., is as available for holding the claim as if done within the boundaries of the claim itself."

In harmony with the views expressed in the cases cited (*supra*), your office, on August 22, 1882 (9 C. L. O., 130), advised Mr. John M. Crawford of Eureka, Nevada, that the expenditures required by law must be made upon the claim itself, or upon *roadways*, tunnels, ditches, or other improvements, used or to be used for, or in connection with, the development of the mine.

Tested by the principles above indicated, it would seem that said certificate of the surveyor general, dated April 5, 1886, conforms substantially to the requirements of the law. It expressly states that the cut was made in the rock to facilitate the extraction of the ore; that the trail and road were built to carry the ores from the claim to the com-

pany's smelter, and that they are not included in any improvements of the company upon any other claim.

It must not be forgotten that good faith on the part of the claimant for public land must be shown in every act. *Dayton v. Hause et al*, (4 L. D., 263); *Erhardt v. Boardo et al* (113 U. S., 527); *Richmond Mining Company v. Rose* (114 U. S., 576).

It is not shown, nor does it appear, that the certificate of the surveyor general is untrue, or that the company has acted in bad faith.

The decision appealed from must be, and is hereby reversed. .

RAILROAD GRANT—ACT OF APRIL 21, 1876.

JACOBS v. NORTHERN PAC. R. R. CO.

Under the act of April 21, 1876, a pre-emption settlement claim initiated after the map of general route was filed but before notice of withdrawal therefor was received at the local office, is sufficient to except the land covered thereby from the operation of such withdrawal.

Acting Secretary Muldrow to Commissioner Sparks, October 14, 1887.

This case involves the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 21, T. 136 N., R. 43 W., Fergus Falls, Minnesota.

Said tract is within the indemnity limits of the grant in aid of the St. Vincent extension of the St. Paul, Minneapolis and Manitoba Railway Company (formerly St. Paul and Pacific Railroad Company), the withdrawal for which became effective in said district February 15, 1872.

When the map of general route of the Northern Pacific Railroad Company was filed—August 13, 1870, this tract was found to be within the granted limits of said last mentioned road. A withdrawal of lands within said limits was received at the local office September 28, 1870.

Upon filing of map of definite location of the Northern Pacific road in 1871, the tract fell outside of the granted limits, and within the thirty mile or indemnity limits. Indemnity lands were ordered withdrawn by Commissioner's letter of December 16, 1871, which was received at the local office January 10, 1872.

March 4, 1871, Royal Jacobs filed pre-emption declaratory statement No. 582, for the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 21, and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 28, township and range aforesaid, alleging settlement September 1, 1870; and on April 3, 1873, he made homestead entry No. 2477 for said tracts in section 28.

Milo F. Jacobs, the present applicant herein, applied to file pre-emption declaratory statement for the tract in dispute April 4, 1882, alleging settlement thereon June 1, 1882, claiming that said last mentioned tract had been excepted from the operation of said withdrawals by reason of the settlement of Royal Jacobs aforesaid. Hearing was had upon this question, and upon the evidence then adduced the local officers found that said land had been excepted from the withdrawals aforesaid, and was therefore subject to the said application of Jacobs.

Upon appeal their decision was affirmed by your office April 17, 1885. Appeal from said decision by the Northern Pacific Railroad Company brings the case here. The St. Paul, Minneapolis and Manitoba Company did not appeal.

The Northern Pacific Railroad Company applied to select this tract August 2, and December 29, 1883, but said applications were rejected. The St. Paul, Minneapolis and Manitoba Company has made no application to select the tract.

The evidence taken at said hearing shows that Royal Jacobs settled on the land for which he filed pre-emption declaratory statement, as early as September 18, 1870, and continued to cultivate and reside upon his claim until long after he made homestead entry as aforesaid in 1873. Up until he made his homestead entry April 3, 1873, the forty acre tract in controversy was included in his claim; he had filed for it and had cultivated a part of it, every year after his settlement September 18, 1870.

The claim of Royal Jacobs then to this land having been in existence prior to the receipt at the local office of notice of the withdrawal on general route, although subsequent to the date when the map of general route was filed in the General Land Office, was sufficient, under the act of April 2, 1876, (19 Stat., 35) to except said forty acre tract from the operation of said withdrawal. Northern Pacific Railroad Company *v.* Dudden (6 L. D., 6); same company *v.* Burus (*id.*, 21); Streeter *v.* M. K. & T. R. R., (2 C. L. L., 833).

Said claim being in existence until April 3, 1873, also excepted said tract from the said withdrawal for the benefit of the St. Paul, Minneapolis and Manitoba Railway Company of February 15, 1872, and also from the indemnity withdrawal for the Northern Pacific Railroad Company January 10, 1872.

Said tract was vacant public land when Milo F. Jacobs settled upon it in 1878, and also when he applied to file for it in 1882. His settlement and application were both prior to the said applications of the Northern Pacific Railroad Company to select the tract for indemnity purposes.

For the reasons above given the decision appealed from is affirmed.

FINAL PROOF—RESIDENCE—BAD FAITH.

PETER GAUGHAN.

That a supplemental affidavit, filed nearly a year after the acceptance of proof and issuance of certificate by the local office, shows the claimant absent from the land is not in itself evidence of bad faith.

Acting Secretary Muldrow to Commissioner Sparks, October 14, 1887.

I have considered the appeal of Peter Gaughan from the decision of your office, dated October 16, 1885, holding for cancellation his homestead entry No. 6356 (Watertown, Dakota, series) of the NW. $\frac{1}{4}$ of Sec. 29, T. 113 N., R. 61 W., made March 25, 1882, upon which final commu-

tation proof was made before the local officers, and cash certificate No. 9901 was issued thereon July 31, 1884, at the Huron office.

The final proof shows that the claimant was a single man and duly qualified to make said entry; that he settled upon said tract on September 25, 1882, and commenced his actual residence same day; that he has lived continuously upon said land, with the exception of being absent two times, to wit, (1) from December 15, 1882, until about April 1, 1883; (2) from December 15, 1883, until April 1, 1884, when he went to Wisconsin to work in a pinery; that his improvements consist of a house, eleven by twelve feet, one story, and sixteen acres of breaking—all valued at \$100; that he has cultivated "five acres of said tract the last season and sixteen acres this season." The witnesses swear to the claimant's good faith. The record contains the affidavit of claimant, giving the correct spelling of his name, dated June 29, 1885, at Waukesha county, State of Wisconsin. The local officers accepted this proof, and issued final certificate.

Your office, on appeal, decides that the proof did not show that the claimant has acted in good faith, but that he was attempting to obtain title to the land through fraud.

It is to be observed that in this case the entryman has not been called upon to furnish any explanation of the proof that is deemed unsatisfactory. It is a fundamental principle of law and morals that fraud will not be presumed. And it is equally true that "no man should be condemned unheard." (Brown's Legal Maxims, 112).

The fact that the entryman nearly a year after the acceptance of his final proof by the local land office, and the issuance of the certificate thereon, dated his affidavit giving the correct spelling of his name, at Waukesha, Wisconsin, is not in itself evidence of bad faith, or an attempt to evade the law.

The decision of your office holding said entries for cancellation must be, and it is hereby, reversed.

TIMBER CULTURE ENTRY—LAND DEVOID OF TIMBER.

KELLEY v. HALVORSON.

A timber culture entry, allowed in accordance with the departmental rulings then existing as to the character of land subject to such appropriation, will not be disturbed where the entryman has subsequently in good faith shown due compliance with law.

Where the evidence is conflicting the joint opinion of the local officers is entitled to special consideration.

Acting Secretary Muldrow to Commissioner Sparks, October 14, 1887.

I have considered the case of A. D. Kelley v. John Halvorson, as presented by the appeal of the latter, from the decision of your office, dated July 29, 1885, holding for cancellation his timber culture entry

No. 2986 of the NE. $\frac{1}{4}$ of Sec. 19, T. 149 N., R. 42 W., 5th P. M., made August 16, 1883, at Crookston land office, in the State of Minnesota.

On October 21, 1884, Kelley filed his affidavit of contest, alleging that said entry is illegal, because said section was not devoid of timber as required by the timber culture law. A hearing was duly had on January 6, 1885, both parties appeared and submitted testimony. From the evidence submitted, the local land officers found that "the testimony submitted is very conflicting, the contestant, his brother, and two other witnesses testify that there are on the section, on which the land in contest is located, groves of timber, poplar and balm gilead trees now growing, of sizes from one to four inches in diameter, some as high as thirty feet, covering an area of forty acres. The claimant and four other disinterested witnesses testify, on the other hand, that there is only a grove of small saplings, about two acres in area, now growing on said section; that these young trees are not larger than that a team can be driven through the grove anywhere," and the register and receiver, therefore, concluded that the entry should remain intact and the contest be dismissed. An appeal was taken, and your office, on July 29, 1885, reversed the action of the local land officers, upon the ground that the land was not devoid of timber at the date of said entry, and hence not subject to entry under the timber culture law.

A careful examination of the testimony shows that much of it is wholly irreconcilable. If the statements of the witnesses for the contestant are to be credited, then, unquestionably, the entry should be canceled. On the contrary, the witnesses for claimant disclose a state of facts that under the rulings of the Department then in force would authorize the entry of said tract under said act. *Sampson v. Dunham* (1 C. L. L., 655); *Osmundson v. Norby* (2 C. L. L., 645); *Nicholas Noel et al.* (2 C. L. L., 673); *Blenkner v. Sloggy* (2 L. D., 267); *Turner v. Moulton* (40 L. & R., 346); *Sellman v. Redding* (2 L. D., 270); *Mattern v. Parpet* (ibid., 272); *Wheelon v. Talbot* (id., 273); *Benjamin Loomis et al.* (id., 274); *Box v. Ulstein* (3 L. D., 143); *Bartch v. Kennedy* (ibid., 437); same on review (4 L. D., 383).

That there was a grove of scattering poplar poles extending from section 30 over the south line of the SW. $\frac{1}{4}$ of section 19 there can be no doubt. According to the testimony for the claimant, as stated in the decision appealed from, these trees are about two hundred and fifty in number, and vary in size from one quarter of an inch to four inches in diameter and from two to eighteen feet in height.

The local land officers having the witnesses before them, and with an opportunity of noticing their demeanor on the stand evidently believed the witnesses for the claimant and did not credit the testimony offered by the contestant.

It has been repeatedly held by this Department that where the evidence is conflicting, the joint opinion of the local officers is entitled to special consideration. *Morfev v. Barrows* (4 L. D., 135).

In the case of *Allen v. Cooley* (5 L. D., 261) this Department held that where an entry was allowed by the local land officers in accordance with the construction of the timber culture law by this Department, and, upon the faith of such entry, the claimant has proceeded to comply with the law, the entryman should not be deprived of the fruits of his labor. See also *Cudney v. Flannery* (1 L. D., 165).

It is not asserted that the entryman has not complied with the requirements of said law as to breaking, cultivation and planting, and a careful consideration of the whole record leads me to the conclusion that the judgment of the local officers is correct.

The decision appealed from is accordingly reversed.

PLACER MINING CLAIM—LEGAL SUB-DIVISIONS.

PEARSALL AND FREEMAN.

The requirement of the statute that a claim upon surveyed land must conform to the legal sub-divisions as nearly as practicable, must be construed to mean that such claims must conform to the survey as nearly as *reasonably* practicable.

Acting Secretary Muldrow to Commissioner Sparks, October 14, 1887.

I have examined the separate appeals of H. D. Pearsall and Carl Freeman from the decision of your office dated March 2, 1886, holding for cancellation mineral entries Nos. 8 and 10, made June 14, 1883, by the former, and mineral entries Nos. 17 and 18, made July 3, 1883, by the latter, at the Gunnison land office, in the State of Colorado.

The record shows that the entries of Pearsall were made of placer claims for lots Nos. 2961 and 2962, containing 157.71 and 122.67 acres respectively.

On March 28, 1887, your office examined the papers in mineral entry No. 8, and advised the local land officers, that the length of said claim appeared to be about five miles, while its width was only from sixty to six hundred feet, extending into sections 21, 22, 23, 27 and 28 of T. 13 S., R. 82 W., that the township plat of survey was filed in the local land office on August 28, 1882, and that the lands adjoining said claim, are unappropriated; that the location of said claim was made by the claimant and seven others, and does not conform to the system of public survey as contemplated by sections 2329 to 2331 Revised Statutes; that in the absence of evidence as to the impracticability of such conformity, said entry was *prima facie* illegal, but the applicant would be allowed a reasonable time within which to file evidence to show the legality of said entry.

On March 31, 1884, a similar decision was rendered relative to mineral entry No. 10, for Lot 2962.

On July 15, 1884, your office advised a special agent relative to all of said entries, stating that "these entries cover a narrow strip of ground along a stream of water from five feet to five hundred feet in width, and

about eighteen miles in length. . . . That there is nothing in the papers submitted by the claimants to show why the locations were not made to conform to the system of public surveys," and said agent was instructed "to ascertain by investigation whether or not it was practicable for the claimants to make their locations in conformity with the government surveys, and whether they have acted in good faith in the premises." The agent was also directed to make a personal examination of the ground and learn the extent and quantity of the mineral, to ascertain the character of the adjoining lands, the value of the tracts in question for other than mining purposes, and any other facts tending to show the good or bad faith of said parties.

On November 3, 1884, your office examined the papers in the matter of said mineral entry No. 18, for lot 2946, and advised the local land officers that application for patent was filed January 26, 1883; that said claim was located by applicant and seven others on October 18, 1882, that the co-locators of applicant on November 1, 1882, conveyed their entire interests to him; that the abstract of title commences at the date of each location, and is brought down to November 24, 1882; that subsequent to entry applicant filed his affidavit duly corroborated, alleging, among other things, that said entry embraced several claims or locations, made by other parties, long anterior to the date of the filing of the township plat of survey, which locations were duly recorded, and have since been kept valid by the performance of the annual assessment work required; that the failure to describe the location of October 18, 1882, as an amended location "was a mere inadvertence," and that the consolidation of the several locations was necessary in order to work them at all.

Your office held "that the location of October 18, 1882, was intended as, and is a re-location without waiver of any rights that may have attached by virtue of said original locations, and that the application for patent rests upon said original assignments thereunder, as well as said re-location of October 18, 1882, and that no claim is alleged under the statute of limitations."

Your office further held that the evidence submitted to show the impracticability of conforming to the system of public surveys "must be deemed satisfactory, if applicant will show, by proper abstract of title, commencing at date of said original locations and continued down to the date of application (*supra*) that he, at date of application, held the possessory title under said original locations."

On November 12, 1884, your office advised the local land officers substantially to the same effect relative to mineral entry No. 8, and on November 14th and 17th, 1884, similar rulings were made by your office, relative to mineral entries No. 17 and 10.

On January 24, 1885, your office returned to the local land officers, copies of the "supplemental reports of deputy mineral surveyor, made under circular of September 23, 1882, relative to said entries "in order

that the applicant in each case may connect himself therewith as per paragraph 5 of said circular," and on the same day, copies of said reports were returned to the United States surveyor general, because they did not show the date when the alleged examinations were made upon which they were based.

On October 7, 1884, said special agent, reported that pursuant to the instructions of your office dated July 15th and August 12, 1884, he examined said claims and found them to consist of auriferous gravel; that they were located according to the laws of the mining district in which they are situated, long prior to the public land survey; that said claims embrace only what is supposed to be placer ground; that, in the opinion of the agent, the entries should be allowed, for the reason that the land is valueless, except for the mineral it may contain; that said claims are some fifteen miles from Tin Cup, the nearest center of trade, and "passed by a direct line of title from the original locators to the applicants; that the work and improvements are ample in each case, and consist of ditches, flumes, houses, pits that have been worked out, and hydraulic pipes, hose, and all necessary appliances for placer mining. Said report was accompanied by affidavits in support of the conclusion, and also copies of the certificates of location of the original claims. On October 15, 1884, said report, and papers accompanying the same, were referred to the division of your office specially organized for the investigation of fraud, and on October 16, 1884, the report was returned to the mineral division with the indorsement thereon "no fraud shown."

On February 9, 1885, the surveyor general transmitted to your office a transcript of the additional reports of the Deputy United States surveyor general, showing the exact date when he made the examination of said claims—to wit, beginning on the 4th and ending on the 14th day of December, 1884.

On February 28, 1885, your office advised said special agent that his said report was "not satisfactory, nor as full as desired." Copies of the official plats of survey were inclosed to said agent, and his attention was called to the fact that the examination on the ground upon which the reports of the United States Deputy mineral surveyor were based, was made during the month of December "when the ground, or a greater portion thereof was undoubtedly covered with deep snow." The agent was directed to make a careful personal, and thorough examination of the character of said claims, and the nature of the adjoining lands. Said agent was charged to "take special care to ascertain the character and extent of all the workings and improvements upon the claim, the location of the same and value thereof, and for what purpose the lands have been, and are now being used, and also the general character and formation of the adjoining ground and the actual extent of the formations found, whether hilly, cañon or level, and whether any of the adjoining ground is placer, and if so the extent thereof.

On March 5, 1885, said agent acknowledged the receipt of your office letter dated February 28, 1885, with inclosures, and stated that he would make the re-examination as soon as the snow disappeared, as it would be impossible to do so before.

On March 9, 1885, your office was advised by said agent that it would be impossible to make the examination required, for at least two months, on account of the great depth of the snow; that before making his former report he made a personal examination of said claims, and that his report was based on that examination alone; that a second examination would not enable him to make a more full report, unless he should spend months on the ground and employ men to actually mine some of the ground in different localities; that "the ground embraced in said claims is *placer* as is shown by actual developments, and cannot be conformed to the public surveys, because the ground adjoining is not *placer*, being high ridges, and so far as known only valuable for grazing, but it is supposed to contain mineral bearing veins, but no lodes have as yet been discovered"; that his conclusions and opinions as stated in his said report were formed from the facts as found by actual examination; that, in the opinion of said agent, the examination of the deputy surveyor was made when there was no snow on the ground, for snow did not come that year until the middle of December; that the improvements on said claims are as indicated on said plats; that they are for general *placer* mining purposes, and have cost many thousands of dollars; that the adjoining lands are not used for any purpose except occasional grazing of stock; that the lines of said claims are uniform as nearly as practicable so as to embrace all the ground which is valuable for *placer* mining, and to exclude that which might prove to be valuable for other purposes, and that there does not appear to said agent to be any "reasonable objection to allowing patents to issue" on said claims.

This supplemental report was referred to the mineral division of your office, on March 18, 1885, and returned to the fraud division on October 16th, and again returned to the mineral division on December 15, 1885, with the statement by the chief of the fraud division that your office letter "directing a re-investigation was based upon wrong conclusions as to the nature and extent of his first examination", and that said cases "were disposed of so far as the question involved in the agent's investigation were concerned, on October 16, 1884."

On January 18, 1886, the chief of the mineral division addressed a letter to the chief clerk of your office, setting forth the former action of your office relative to said claims in which attention was called to the fact that the applicants had furnished abundant evidence showing that the locations were made long prior to the public survey, and that a mistake was made in the record; that when called upon again for additional evidence, the applicants withdrew the evidence relative to the mistake alleged, and filed instead, several affidavits showing the

impracticability of conforming the locations to the system of public surveys, "thereby evading the issue raised, by the change of position as stated above"; that owing to the suspicious character of said claims, an investigation by a special agent was ordered by your office, but his report was unsatisfactory, and another examination was ordered which the agent failed to make; that the plats exhibit evidence of placer workings at only nine different points, while the greater portion of the claims "show no improvements whatever thereon"; that "it is manifest that these entries were made for the sole purpose of getting control of the water, and not for mining purposes," and a recommendation was made that said entries be held for cancellation.

On February 23, 1886, said chief clerk directed that said cases be returned to the mineral division.

On March 2, 1886, your office held said entries for cancellation for the reason that they were made for the purpose of controlling the water power, more than for their value for mining purposes.

From the foregoing somewhat lengthy and anomalous recital it appears that the sole ground upon which said entries were held for cancellation, is fraud in their inception.

A careful examination of the whole record fails to disclose sufficient evidence to warrant such conclusion. The entries were made after due notice by publication, no adverse claim was filed, no protest made, and many thousands of dollars have been expended in substantial improvements upon the claims. The investigation of the special agent of your office and the reports of the United States deputy mineral surveyor not only fail to show any evidence of fraud, but affirmatively prove good faith.

The proper constructions of section 2329 to 2331 Revised Statutes, was carefully considered by this Department in the case of William Rablin (2 L. D., 764), wherein it is held that the requirement of the statute that the claim upon surveyed land must conform to the legal subdivisions thereof, "as near as practicable," must be construed to mean that the claims must conform only "as near as reasonably practicable"; that it is the intention of the mining laws generally, to permit persons to take a certain quantity of land fit for mining and not compel them to take such a quantity irrespective of its fitness for mining; that the act of July 9, 1870 (16 Stat., 217) was modified by the act of May 10, 1872 (17 Stat., 91) so as to provide for exceptional cases.

In the case of Franklin L. Bush *et al.* (2 L. D., 788), this Department held that a mineral entry should not be held for cancellation upon the report of a special agent, but a hearing should be duly ordered and evidence submitted showing the illegality of the entry.

In the case at bar the evidence shows that said entries were made in good faith, and ought not to be canceled. The decision of your office must be and is hereby reversed.

*PRE-EMPTION—SETTLEMENT—FILING—PROOF.**GRAY, v. NYE.*

Though the settlement alleged as the basis of the filing may be insufficient, if the pre-emptor, after filing, and before the intervention of an adverse right, settles in good faith on the land the defect in his claim is cured thereby.

Final proof must be submitted on the day fixed in the notice.

Secretary Lamar to Commissioner Sparks, July 1, 1887.

I have considered the case of Francis M. Gray *v.* Frank E. Nye, as presented by the appeal of the letter from the decision of your office, dated November 12, 1885, rejecting his proof and holding for cancellation his pre-emption declaratory statement No. 12112, filed in the local land office at Huron, Dakota, on February 23, 1883, alleging settlement the same day on the NW. $\frac{1}{4}$ of Sec. 30, T. 111, R. 63.

The record shows that Nye on December 5, 1883, gave due notice of his intention to make final proof in support of his claim, before the local land officers, on February 20, 1884. On the day appointed for making said proof Gray filed his protest, alleging that Nye did not make a residence on said tract as required by law; that said Gray was the prior settler, and that Nye's alleged settlement was not followed by a residence as required by the pre-emption law. On the day appointed for making final proof the claimant failed to appear, but on the next day, to wit, February 21st, he appeared and filed his affidavit, alleging that his failure to appear at the time appointed was owing to the absence of one of his witnesses, whose attendance he could not procure. On the 21st of February Nye submitted his final proof taken before the receiver. Said proof shows that Nye is a single man, duly qualified to make entry under the pre-emption law; that he first settled on said tract February 22, 1883; that he built a shanty on the land the same day; that he established actual residence "in February 1883;" that his residence has been continuous upon said tract, except as set forth in the special affidavits filed with said proof; that his improvements consist of a house, stable and six acres of breaking—all worth \$150.

The special affidavits above referred to are (1) the affidavit of Nye, who swears that his residence on the land has been as continuous as he could make it under the circumstances, that during the time he was making his residence on said claim he was obliged to work for a living and to secure work he has been obliged to leave said claim for a few days at a time; that he has not been away from his claim more than ten days at a time, with one exception, when he was compelled to remain away from his claim for a period of six weeks on account of sickness; and (2) the affidavit of his physician, who swears that "on the 8th day of June, 1883, I was called to attend Frank E. Nye, that said Frank E. Nye was very sick and unable to leave the house for about six weeks, and could not

have gone out to his claim without endangering his life during that period of time."

On June 16, 1884, a hearing was had upon said protest, and testimony was offered by the protestant, the claimant standing upon the final proof heretofore submitted.

From the evidence submitted the local land officers found that Gray filed his pre-emption declaratory statement for said tract on June 11, 1883, alleging settlement thereon same day; that Nye was the prior settler, and that he has the prior right to the land; and they submitted the proof to your office with a request that they be advised whether the proof as to residence is sufficient. Your office, on appeal found that Nye's filing was not preceded by a valid settlement; that he did not establish a residence in good faith on the tract within a reasonable time, nor until after the intervention of the claim of Gray; that his residence has not been continuous; that he has acted in bad faith, and that his filing must be held for cancellation.

The evidence clearly shows that Nye went upon the land upon the day alleged and put up some boards; that subsequently he built the body of a house upon said land, and covered it before the settlement and filing of Gray. Even conceding that the settlement of Nye on February 22, was not as complete as the law requires, his subsequent settlement prior to the initiation of Gray's claim cured the defect. This has become the settled ruling of this Department. *Kelley v. Quast* (2 L. D., 627); *Man v. Huk* (3 L. D., 452); *Hunt v. Laviu* (*ibid.*, 499); *Bell v. Ward* (4 L. D., 139).

It is quite clear that Gray went upon said tract with full notice of the prior claim of Nye. Nye's declaratory statement was on file in the local land office and his cabin was upon the land. An attempt is made to discredit the final proof of claimant, and one of the witnesses to the final proof and the physician who made said affidavit were introduced for that purpose. But the attempt was not successful. Very little credit ought to be given to witnesses who attempt to explain away the effect of their former statements, under the peculiar circumstances as shown by the record in this case.

After a careful examination of the whole record, it does not appear that it is shown that the claimant has acted in bad faith. It does appear, however, that the proof was not taken upon the day appointed, and the claimant should be required to make new proof within a reasonable time after due notice of the time and place at which all parties so desiring will have an opportunity of protesting against the acceptance thereof. The decision of your office is modified accordingly.

*PRACTICE—DECISION OF LOCAL OFFICE—PENDING SUIT.***WADE v. SWEENEY.**

When a decision has been rendered by the local office the record in the case should be in due course, forwarded to the General Land Office; and the local office should not thereafter take any action looking toward a disposal of the land until further advised.

An amended affidavit of contest submitted after the case is closed in the local office, embracing further charges against the entry, is in effect a new affidavit of contest which should be held to await the final determination of the pending suit.

In the absence of proper service of notice jurisdiction is not acquired.

Acting Secretary Muldrow to Commissioner Sparks, July 22, 1887.

I have considered the case of William W. Wade v. James Sweeney, as presented by the appeal of the former from the decision of your office, dated August 13, 1885, dismissing his contest against the timber culture entry No. 1332 of the SE. $\frac{1}{4}$ of Sec. 28, T. 102 N., R. 56 W., made by said Sweeney on July 26, 1878, at the Yankton (now Mitchell) land office, in the Territory of Dakota.

It appears from the record that Wade filed his affidavit of contest against said entry on March 1, 1883, and notice issued thereon charging failure to "plant trees, seeds or cuttings, and cultivate them during three or four years subsequent to entry."

April 23, 1883, was set for taking testimony before one J. B. Nation, a notary public, and the hearing before the local land officers was fixed for May 2, 1883.

It also appears that by a clerical error the words "failed to" were left out of the contest affidavit, and, by a mistake, the printed notice cited the parties to appear before said notary public on April 23d instead of April 25, 1883. On the 25th day of April, 1883, the attorney for claimant appeared and filed a motion to dismiss said contest, on the ground (1) that no proper service of notice had been made; (2) that said officer was not qualified to take the testimony in the case, because he is the partner of the attorney for contestant, and (3) that the affidavit of contest did not charge any failure to comply with the timber culture law. The testimony was taken, and on May 2, 1883, counsel for claimant made the same motion to dismiss said contest before the local land officers.

On June 3, 1883, the register filed an opinion that said contest affidavit was defective; that there was no proper service of notice; that the testimony failed to show want of compliance with the requirements of law by the claimant, and that said contest should be dismissed.

The receiver filed no opinion in said case.

On June 25, 1884, more than a year afterwards, said Wade filed an amended affidavit of contest, alleging that said entry was illegal and that up to the time of filing the former affidavit the claimant had not complied with the requirements of the law as to planting and cultivation.

The contestant filed said amended affidavit, for the reason, as he alleges, that the objections to the former proceedings urged by the claimant were well founded, and he asked that a new hearing be ordered, and that the former proceedings be set aside.

The receiver granted the motion, and notice was issued fixing the hearing before the local land officers on September 12, 1884. Due service of said notice was acknowledged by the attorneys of claimant, on July 31, 1884. On September 12, 1884, the attorneys for claimant filed a motion "that the proceedings sought to be instituted under the new notice be terminated and the notice recalled, and that the case as tried in 1883, proceed in the regular way." The register granted said motion, and set aside the order for a hearing, upon the ground that the receiver should either concur with, or dissent from the opinion of the former register.

The receiver states: "I did not and do not concur in the opinion of Register Letcher, for the reason that I was not satisfied of the bona fides of the original entry—not satisfied that such a person as James Sweeny existed, or had any interest in the land." The receiver also refused to concur with the opinion of Register Everitt, for the reason that, "the door should be opened and the fullest scope given to the inquiry."

Your office, on August 13, 1885, dismissed the contest, on the ground that the "proceedings were wholly irregular."

From the foregoing, it is evident that under the rules of practice, Nos. 51, 52, 53 (4 L. D., 43), the record of the first contest proceedings should have been forwarded to your office, and no further action taken by the local land officers looking to the disposal of the land, until further advised. There was no proper service of notice of the first hearing, and hence no jurisdiction was acquired to determine the rights of the respective parties. The filing of the amended affidavit of contest charging, among other things, that said entry was illegal, was in effect the filing of a new affidavit, and it should have been received, but no notice should have issued thereon until the final determination of the first contest. The first contest should be dismissed, and the contestant should be allowed to proceed under the amended or second affidavit of contest, and show the illegality of said entry.

The decision appealed from is modified accordingly.

PRACTICE—APPLICATION FOR REHEARING—RELINQUISHMENT.

WARN *v.* FIELD ET AL.

On application for rehearing notice thereof should be given the adverse party, and rights against such parties cannot be secured on showing that the failure to serve said notice was the result of erroneous information received at the local office as to the requirements of the rules of practice.

An attorney practicing before the Department is presumed to know the rules of practice, and that the local officers have no authority to waive or suspend a rule prescribed by the Department.

Permission accorded to perfect a defective application for rehearing will not impair an intervening adverse right.

A relinquishment filed after the final dismissal of a contest does not inure to the benefit of the contestant.

Acting Secretary Muldrow to Commissioner Sparks, July 25, 1887.

I have considered the case of Daniel Warn *v.* Ira S. Field and Chester N. Ramsdell, as presented by the appeal of the former from the decision of your office, dated June 22, 1885, refusing to award to him the preference right of entry of the SE. $\frac{1}{4}$ of Sec. 28, T. 110 N., R. 44 W., Tracey land district, State of Minnesota, and allowing Ramsdell's timber culture entry of said tract to remain intact.

The record shows that said Field made timber culture entry No. 13 of said tract, on June 3, 1873. On September 3, 1883, Warn initiated a contest against said entry, alleging non-compliance with the requirements of the timber culture law as to planting and cultivation of timber on said tract. The hearing was duly had on October 11, following, at which both parties appeared and offered testimony. The contestant, on April 17, 1884, filed an affidavit, showing his qualifications to enter said tract under said act, and asked to have it considered as filed at the initiation of said contest. The local land officers dismissed said contest, on the ground that said affidavit was not filed in time, and stated that "the evidence shows that upon the merits the entry should be canceled." From this action Warn appealed, and your office on January 7, 1885, decided that, since the contestant had filed the affidavit required, and no intervening right had accrued, the defect must be considered cured, on the authority of *Dayton v. Scott* (11 C. L. O., 202); that the testimony showed that the claimant broke thirty-seven acres of said tract in June 1873, planted about seven and a half acres thereof in the spring of 1874 to nuts and tree seeds, eight feet apart; that in 1875 he planted the land in corn, between the rows of nuts and seeds, because it was impossible to cultivate the land; that before the expiration of 1875 the corn and trees were injured by the grasshoppers; that in 1876, on account of the injury done by the grasshoppers, the claimant plowed up the land, and sowed the same to oats; that in 1877 said land was replanted with nuts and seeds, and the same was cultivated only one way, because part of the land had been planted in drills; that

in 1878 he planted about seven acres more in box elders, having previously properly prepared the ground; that in 1879 claimant bought 12,000 trees, which were planted in the spring of 1880, but they did not grow; that in 1882 claimant purchased 14,000 cuttings, which were planted and hoed, so as to keep the weeds from choking the trees; that it is in testimony that there are over 8,000 trees, of different sizes and of healthy condition growing on the land in controversy; that the claimant has acted in good faith in attempting to comply with the requirements of said law, and that said contest must be dismissed.

On February 14, 1885, counsel for Warn forwarded to your office an application for a rehearing, which was returned by your office on March 18, 1885, because the same had not been duly served upon the opposing party or his counsel. On March 14, 1885, said Field filed in the local land office his relinquishment of said entry, which was thereupon canceled, and on the same day one Chester N. Ramsdell was permitted to make timber culture entry No. 1881 of said tract. Said relinquishment was forwarded to your office on March 16, and on the 23d, same month, the local land officers reported that no appeal had been taken from your office decision, dated January 7, 1885, dismissing said contest. On April 1, 1885, your office received the application for rehearing, dated March 26, 1885, returned by the counsel for Warn with proof of service upon said Field by registered letter. On April 10, 1885, your office advised the local land officers of the proceedings relative to said application for a rehearing; that the cancellation of said entry had that day been noted on the records of your office; that said action closed the case, and that they would so notify the parties in interest.

On May 27, 1885, resident counsel for Warn filed in your office a letter, calling attention to said case, and requested that you instruct the local land officers that Warn has the preference right of entry, and direct them that, first, "if they have allowed an entry of the land by any other person to cancel such entry; and, second, to notify Warn that his right to enter the land is recognized, and requiring him to make entry thereof within thirty days from receipt of notice." On June 2, same year, said counsel filed in your office the *ex parte* affidavit of the local attorney of said Warn, giving a detailed account of his conversation with the receiver of said office, in which the receiver advised him that it would not be necessary for the contestant to comply with the rule of practice relative to service of said motion for rehearing upon the opposite party. There is no evidence that this affidavit was ever served upon the opposite party, and even if it be true, it could certainly give the contestant no right as against third parties. On June 22, 1885, your office replied to said letters, reviewed the proceedings had in the case, and declined to issue the instructions prayed for, upon the ground that the party had failed to prove the allegations of his contest, and cited as authority therefor the decision of the Department in the case of John Powers (1 L. D., 103).

By your office letter, dated July 16, 1886, was transmitted the relinquishment of Ramsdell's said entry, and an inspection of the records of your office shows that one Edward D. Bigham made timber culture entry No. 1967 of said tract on June 14, 1886.

From the foregoing somewhat lengthy recital, it is clear that the record contains no error of which the appellant can complain. Your office might very properly have refused said application of Warn for the reason that he does not apply to enter the particular tract of land in question, upon the authority of the case of Fremont S. Graham (4 L. D., 310).

Again, the testimony of the claimant taken at the hearing, if true, showed that the contestant had failed to prove his allegations of contest, and such was the judgment of your office. The contestant, in his application for rehearing, claims surprise, but his surprise was not sufficient to induce him to apply for a rehearing before the local land office. The application for a rehearing, forwarded to your office, was clearly defective, and although your office allowed the contestant to cure the defect, yet, such action could not and was not intended to impair intervening adverse rights. The application for rehearing was insufficient, even though duly served, to warrant a rehearing of said case, and your office in effect refused it by your decision of April 10, 1885, declaring the case closed.

An attorney practicing before this Department is supposed to know the rules of practice. (*Sweeten v. Stevenson*, 3 L. D. 249 Note); and in the case at bar said attorney avers that he called the attention of the receiver to the rule of practice and was told by him that it was not necessary to observe it. This statement is not corroborated, and said attorney was bound to know that the local land officers have no authority to waive or suspend a rule of practice prescribed by this Department. Besides, the attorney for said Fields avers that he has been the attorney of record in said case; that on the day prior to the filing of said relinquishment, said Warn informed him that he did not intend to prosecute said case any farther; that he communicated said statement to said Field before said relinquishment was filed on March 14, 1885; that said attorney for claimant frequently met the local attorney for the contestant and conversed with him about said case, and that he never intimated that an appeal or motion for rehearing had been or would be made in said case. Counsel for claimant has also filed with his answer to said appeal the affidavits of said Field and Ramsdell that they never had any notice that said Warn intended to appeal or move for a rehearing in said case until June 30, 1885, when the notice of appeal from your said office decision, refusing said instructions, was served on them.

These affidavits, although served upon the opposite party having been filed with the answer of the claimant, have not been considered in arriving at a correct conclusion in the case at bar.

A careful examination of the authorities cited in the elaborate brief of counsel for appellant shows that either they do not apply to the case at bar, or that they fully sustain the decision appealed from. See also *Hoyt v. Sullivan* (2 L. D., 283).

The decision of your office dismissing said contest had become final for want of appeal, and hence the filing of said relinquishment, under the circumstances as disclosed by the whole record, can not be held to inure to the benefit of the contestant, who had failed to prove the allegations of his contest.

Since said decision of your office was rendered, the attention of this Department has been called to the report of a special agent, dated May 14th last, relative to the status of said land, and ordinarily a further investigation would be ordered, but for the fact that the contestant has lost whatever rights he might have acquired by his failure to comply with the rules of practice as above indicated, and the further fact that at the date of said report one year had not elapsed since the date of Bigham's said entry, to wit, June 14, 1886.

The decision appealed from is accordingly affirmed.

PRACTICE—APPLICATION FOR REHEARING; TRESPASS.

LOGAN v. SMITH.

In a contested case application for rehearing must be made in accordance with the rules of practice. An informal petition signed by the neighbors and friends of the applicant is not sufficient.

On the cancellation of an entry the tract covered thereby becomes vacant public land, and the Department has full authority to protect the same from trespass.

Acting Secretary Muldrow to Mr. M. Thornburg, Santa Maria, California, July 25, 1887.

Referring to your inquiry of the 5th instant, in the matter of the departmental decision rendered in the case of S. H. H. Logan v. Joel Smith, involving the timber culture entry of said Smith for the SE. $\frac{1}{4}$ of Sec. 34, T. 10, R. 34 W., San Francisco land district, California, you are informed as follows:

(1) If a rehearing in said case is desired, an application therefor should be made in accordance with the rules of practice, a copy of which is enclosed herewith. From the rules aforesaid, you will observe that in a contested case favorable action could not be taken upon an informal petition for a rehearing, signed by the "neighbors and friends" of the claimant.

(2) As to the defendant's right, after the cancellation of his entry, to remove any improvements, crops, timber trees, etc., placed by him on the claim, the Department will not undertake to express an authorita-

tive opinion in the absence of a case wherein such question may be directly in issue. It should be remembered, however, that when said entry is canceled the land covered thereby becomes at once vacant public land, the title thereto resting in the government, and that the Department is vested with due authority to protect such land from trespass.

PRACTICE—MOTION TO DISMISS—APPEAL.

RAVEN v. GILLESPIE.

Statements, not controverted or questioned, made as the basis of a motion to dismiss, of which due notice has been given, are accepted as true.

On the motion of the appellee, an appeal, not filed in time, must be dismissed.

Acting Secretary Muldrow to Commissioner Sparks, July 25, 1887.

In the homestead contest of Robert S. Raven *v.* John N. Gillespie, appealed from the decision of your office, dated October 24, 1885, holding for cancellation the defendant's homestead entry on the NE. $\frac{1}{4}$ of Sec. 21, T. 117 N., R. 60 W., Huron, Dakota, a motion has been made by the contestant to dismiss the appeal.

On February 11, 1886, appellant's attorney was served with a copy of the motion to dismiss. This motion contains what purports to be a statement of the facts on which it is based, and this statement not being traversed, or its verity in any manner questioned by the appellant, is accepted by the Department as being true. Said statement is as follows:

"The record shows, decision of the Commissioner October 24, 1885. Notice was sent to N. D. Walling, attorney for appellant on November 2d through the mail, by the local officer at Huron, though the attorney lived in Huron. Assignment of error and argument were filed by Walling, attorney, at the local office January 16, 1886, and the same date the same were served on Messrs. Whitlock and Comfort, residents of Huron, who were not in fact the attorneys of appellee, but were superseded by present counsel, whose appearance was duly entered when defendant took appeal from the decision of local office. . . . No notice of appeal has ever been served on appellee or his counsel.

This statement of fact being taken as true, the appeal must be dismissed.

From November 2, 1885, to January 16, 1886, is seventy-five days, and the rules of practice require the notice of an appeal from the decision of the Commissioner to the Secretary of the Interior to be served on the appellee or his counsel within sixty days from the date of the service of notice of the decision appealed from; ten days additional being allowed when service of notice by the local officers is given through the mail. (Rules of Practice 86 and 87.)

The appeal is dismissed.

PRACTICE—PARTIES—EVIDENCE.

SENHOLT *v.* REYNOLDS.

Hearsay testimony is admissible, in the absence of better evidence, to prove the death of a party.

In case of contest against the entry of a deceased homesteader the heirs of the entryman must be made parties defendant.

Acting Secretary Muldrow to Commissioner Sparks, August 20, 1887.

I have considered the case of John Senholt *v.* Fred Reynolds, involving the latter's commuted cash entry on the SE. $\frac{1}{4}$ of Sec. 30, T. 153 N., R. 47 W., Crookston, Minnesota, appealed from the decision of your office, dated November 19, 1885, holding said entry for cancellation, and allowing the parties who are seeking the re-instatement of the homestead entry of John H. Freise additional time in which to furnish proof of the death of said Freise and of the relationship of said parties to him.

The material facts shown in the case are as follows :

On May 5, 1879, John H. Freise made a pre-emption filing on said land, which was on March 27, 1880, transmuted into a homestead entry. On November 16, 1880, Reynolds contested this entry, notice was given by publication, and an *ex-parte* hearing was had on December 17, following, and on August 12, 1881, Freise's homestead entry was canceled. On September 3, 1881, Reynolds made homestead entry on said land and commuted the same to cash entry on May 27, 1882. About this time your office was informed by letter from Senholt, who claims to be a half-brother of the original entryman, that Freise was killed by Indians July 11, 1880, while carrying the United States mail from Bismarck to Miles City, and asked if the writer was not entitled to his brother's claim. On January 31, 1883, the Reynolds entry was suspended. Subsequently, and after having received, in the form of affidavits, information justifying such action, your predecessor in office directed the local officers to order a hearing in this case, which after several continuances was finally had on April 1, 1885.

You hold that the evidence adduced at the hearing does not satisfactorily establish the death of Freise, or the relationship to him of the parties asking the re-instatement of his entry and claiming to be his heirs. You further hold that Reynold's entry, because of his employment in the local office, was illegal and should be canceled.

There is a total absence of evidence in this case even remotely tending to show that said entryman John H. Freise, now claimed to be dead, was not the half-brother of John Senholt, and the son of Charlotta Senholt, as claimed by them. Fritz Mellow testified at said hearing that he knew said Freise at Menominee, Wisconsin, in 1877, and has often seen him on the land in controversy and in his shanty there ; that he was acquainted with Charlotta Senholt in 1880, and then talked with

her about this land and her son J. H. Freise—did not know that Freise was her son, but she claimed that he was. John Senholt testifies that Freise was his half-brother; that his mother, Charlotta Senholt, claimed him as her son and that Freise claimed her as his mother. This testimony, in the absence of conflicting evidence, satisfactorily establishes the claimed relationship.

Certain letters received by Richard B. Reiley, then attorney for contestant, in reply to letters sent by him to the persons by whom they purported to be written were offered in evidence at the hearing, among which were two from C. A. Launsberry, dated at Bismarck, December 25, and 30, 1884, in which he says the record shows "that J. H. Freise who carried the mail which left Bismarck for Miles City July 10, 1880, was killed by Indians. The time being sixty hours, he must have been killed on the 11th or 12th. It was near Beaver station—not far from Powder River, Montana. John McConville was carrying mail at the time and brought down the things belonging to Freise. Alvah Ketchen buried Freise. His body was not found for ten days after. I have the mail sacks in the office yet, or the parts left. They, the Indians, cut off the parts of the sacks that would be of no use to them and left the tops and bottoms."

Another letter offered in evidence is dated at Skelton Ranch, Indian Territory, January 19, 1885, and signed by N. C. Miner. He says: "I was keeping the ranch three miles from the place where John H. Freise was killed. I sent his valise and clothes to the stage office at Bismarck—heard the clerk say he sent them to his folks in Wisconsin near Wenomna (Menominee). . . . He was killed July 12, 1880."

Said attorney, Reiley, testifies that the greater part of the work done by him in connection with this case was in searching for evidence of the death of J. H. Freise, nearly all of which had been done since October or November, 1884; that letters were written to parties with the ultimate purpose of procuring their depositions to be used in this case; that depositions were not taken because Senholt failed to furnish him money to pay the cost of taking them, and that three or four weeks before the hearing he withdrew from the case, as he had some time before told Senholt he would do if the necessary funds were not furnished him.

Senholt is a young man, and seems to be a common farm laborer. He testifies that his mother is poor, and that he could not raise the money required by his attorney; that he corresponded some with Freise in 1880, and that the last letter received from him was by his mother in June of that year, and was, he thinks, from Bismarck; that his clothes were sent home to Menominee, Wisconsin, by express in August, 1880, from Bismarck, or Miles City, accompanied by a letter addressed to his mother from a place where he was driving stage, informing her that he was killed by Indians; that one suit which he saw his mother take out of the valise—a Sunday suit—was the last one he saw him in, and that the homestead receipt offered in evidence was found with his clothes.

This receipt, dated March 27, 1880, and signed by P. C. Sletten, the receiver of the land office at Crookston, Minnesota, is in the words and figures following:

Received of John H. Freise the sum of eighteen dollars, being the amount of fee and compensation of Register and Receiver for the entry of south east quarter of section 30, in township 153, range 47, under Section No. 2290, Revised Statutes of the United States.

Senholt further swears that Freise is dead. Certain registers or records of the arrival and departure of mails for the month of July, 1880, at Bismarck, Dakota, and Miles City, Montana, and which are required by law to be kept by the postmasters at the terminal points of a route, and forwarded to the Post Office Department at Washington, D. C., at the close of each month, and now in said Department, contain the following entries, touching the question of Freise's death, to wit:

Bismarck, July 10, 1880. "Mail which left Bismarck on this date was captured by Indians, and the driver J. H. Freise killed."

"Miles City, July 13, 1880. "Failure. Carrier killed by Indians, and pouches destroyed.

Hearsay evidence is frequently admitted to prove the death of a party. Indeed, is often the only means by which it can be done. Excluding the letters offered in evidence as incompetent testimony, there is still enough in Senholt's testimony and this record, in the absence of any and all testimony in any manner tending to show that Freise is alive, to overcome in a civil proceeding the bare presumption of life, and to satisfactorily establish the fact that Freise died on or about the 11th or 12th of July, 1880.

This makes it unnecessary for me to pass on the question of Reynold's qualification as an entryman, because Freise being dead at the time his entry was contested, and his heirs not having been made parties defendant in that proceeding, the local officers and the Commissioner of the Land Office had no jurisdiction in the matter, and the Reynold's entries must be canceled as being in conflict with Freise's prior entry.

Your decision is modified to conform to this opinion, and you will please cause the entry of John H. Freise, deceased, to be re-instated.

PRACTICE—REVIEW—NEWLY DISCOVERED EVIDENCE.

DAVIS & PENNINGTON v. DRAKE.

Newly discovered evidence material to the issue, which could not have been with reasonable diligence procured at the trial, is proper ground for the review of a departmental decision; but such action is not warranted on evidence merely cumulative in character.

That the evidence submitted is conflicting is no ground for new trial.

Acting Secretary Muldrow to Commissioner Sparks, September 2, 1887.

Henry L. Davis and Catherine J. Pennington by their attorney have filed a motion asking for review of departmental decision, dated April

18, 1887, and for rehearing in the case of said parties *v.* Brice B. Drake, involving the E $\frac{1}{2}$ of the NE. $\frac{1}{4}$, and the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, Sec. 34, T. 50 N., R. 1 N. M. M., Gunnison, Colorado.

Said decision affirmed that of your office and of the local office, and awarded the land described to Drake who had made commutation cash entry therefor.

The question at issue was raised on contest instituted after the making of said cash entry, and involved the character of the land (*i. e.*) whether agricultural or mineral (coal), and also the *bona fides* of the entryman in his transactions relative to this entry.

This motion is based upon what is alleged to be newly discovered evidence material to the issue. In support of it is filed the report of one P. H. Van Diest, who is said to be an "expert mining engineer." This report appears to have been made pursuant to the orders of the surveyor general of Colorado, and is dated October 7, 1886. It sets forth that said mining engineer on the 30th of September preceding, examined the land in question, and found some coal veins there, but could not find any cabin on the claim of Drake. He states that the coal vein may be of an inferior quality, and of little thickness, and that probably it can never be mined with profit, but that nevertheless there is coal there; that the land is barren and unfit for agricultural purposes, and that it can be irrigated only by bringing water several miles by ditch. The report further goes on at considerable length to show argumentatively, that Drake's claim never was a valid one, and that the contest of Davis and Pennington ought not to have been dismissed.

This report is not verified by the oath of said mining engineer, nor is it shown that he is now, or was then, in the employ of the government, further than that he was ordered by the surveyor general to make this examination.

As opposed to the motion under consideration is filed here on behalf of the present owners of the land a protest against its allowance, and several affidavits alleging facts totally at variance with the report before mentioned.

Rule 76 provides that motions for review or reconsideration of the decisions of the Secretary of the Interior, will be granted in accordance with legal principles, applicable to motions for new trials at law, after due notice to the opposing party.

Newly discovered evidence material to the issue, which the party could not with reasonable diligence have procured at the former trial is held to be good ground for a motion for new trial at law, and likewise for a review of a departmental decision. But can the statements made in the report referred to be considered as *newly discovered evidence material to the issue*? I think not.

It will be observed that the matters touched upon in this report were all in issue when the case was originally tried. Evidence upon both sides of the question was taken, and from an examination of such evi-

dence the local office, your office, and the Department all found in favor of the validity of the entry and against the contestants. It was found that the land was of more value for agriculture than for minerals, and that the entryman had acted in good faith in the matter of his claim.

The entryman, Drake, is now dead, and the land has passed into the hands of third parties.

Assuming the report, therefore, to be evidence, it is nothing more than cumulative of that offered on the part of contestants when the original case was tried. It is not, therefore, ground for a new trial. *Weldon v. McLean* (6 L. D., 9), citing *Hilliard on New Trials*, 2nd Ed., 500.

The fact that the evidence is conflicting, is no ground for new trial. *Long v. Knotts* (5 L. D., 150), *Knox v. Bassett* (id., 351), *Neilson v. Shaw* (id., 387).

For the foregoing reasons the present motion is denied.

COMMUTATION PROOF—RESIDENCE.

NELLIE O. PRESCOTT.

The maintenance of a residence established in good faith is not inconsistent with absences rendered necessary to secure a support, and improve the land.

Acting Secretary Muldrow to Commissioner Sparks, September 3, 1887.

Nellie O. Prescott made homestead entry of Lots 2, 3, and 4, Sec. 1, T. 108, R. 58, Mitchell district, Dakota, on July 8, 1883. She hired built a frame house, ten by twelve feet, in which she took up her residence about the 1st of August, same year. About a month later she was appointed teacher of the school at Howard, the county seat of the county in which her land was located, and continued to be employed as teacher at that place until she made commutation proof, February 7, 1885—something over eighteen months after establishing her residence on the tract. During this period there were vacations in her schools of two weeks in the winter of 1883-4; one week in April, 1884; two months including July and August, 1884; and two weeks in the winter of 1884-5. These vacations she spent upon her claim, where she also "generally" spent Saturdays and Sundays while teaching—the exceptions being when the weather was exceedingly inclement. She was never absent for a month at any one time. Her house was furnished with bed, stove, cooking utensils, table, dishes, chairs, and other articles of housekeeping; she also kept therein her trunk, clothing, and all her personal property. She has no other home; while at Howard teaching she paid her board at a boarding house, weekly. She has hired broken fifty-eight acres of land, of which twenty acres were cropped during the season of 1884, and thirty-eight the season of 1885. All she has earned, except

enough to pay for her board and purchase necessary clothing, has been expended in improving her claim.

The local officers accepted claimant's commutation proof and money. By your office letter of January 21, 1886, however, said final proof was "rejected and the cash entry held for cancellation, the claimant not having complied with the law in the matter of residence." Thereupon claimant appeals.

In my opinion it is clearly shown that the claimant took up her residence on the tract in question, in good faith, about August 1, 1883, and that it has ever since remained her bona fide residence.

I therefore reverse your decision, and direct that the commutation proof be accepted.

SETTLEMENT RIGHTS—ENTRY—RELINQUISHMENT.

WILEY v. RAYMOND.

On the relinquishment of an entry the right of a settler, then residing on the land, attaches *eo instanti*, and is superior to that of a homesteader who enters the land immediately after the said relinquishment.

A relinquishment is ineffectual, so far as releasing the land is concerned, until filed and the purchaser of a relinquishment acquires no right thereby to the land. His right as a settler must date from the time when he made actual personal settlement.

Acting Secretary Muldrow to Commissioner Sparks, September 22, 1887.

This case comes here on the appeal of Calvin Raymond from the decision of your office, dated November 11, 1885. The land involved is Lot 3, Sec. 20, and N. $\frac{1}{2}$ of NE. $\frac{1}{4}$, Sec. 29, T. 44 N., R. 31 W., St. Cloud, Minnesota, and the material facts in the case, as shown by the record, are substantially as follows:

Charles H. Wiley filed pre-emption declaratory statement No. 4739 August 19, 1881, for the land described, alleging settlement August 17, 1881. August Follman made homestead entry No. 12,353 for the same land April 1, 1883, which was canceled September 11, 1883, because of voluntary relinquishment; and on the same day Charles Grassick made homestead entry No. 12,500 for same land. October 16, 1883, Grassick and Wiley went to the local office together and Grassick relinquished his entry, at the same time making affidavit that his duplicate homestead receipt was lost. Wiley upon the cancellation of Grassick's entry immediately made homestead entry No. 12,546 for same land.

October 19, 1883, Calvin Raymond appeared before the clerk of the district court for Crow Wing county, and made homestead application for said land, alleging settlement October 15, 1883, one day prior to the cancellation of Grassick's entry. This application accompanied by the duplicate receiver's receipt of Grassick's entry, on the back of which was a relinquishment by Grassick, signed in the presence of two wit-

nesses, F. O. Sibley and James Porter, and dated October 6, 1883, was duly presented at the local office and by it rejected because of the said homestead entry of Wiley.

December 15, 1883, the attorney for Raymond filed in the local office an affidavit by Grassick, dated at Winona, Minnesota, December 7, 1883, in which he alleges that he never made any other relinquishment than the one delivered to Raymond, and that if any other relinquishment of his existed, it was obtained from him without his consent. This affidavit was made the basis of hearing, which was had before the local office May 13, 1884, both parties hereto being present and offering evidence.

The hearing was ordered primarily to ascertain which of the relinquishments made by Grassick was valid; but a great deal of the testimony related to residence upon the tracts by each of the parties to the controversy, and also as to the improvements made by each.

The local officers found from the evidence that the relinquishment made by Grassick October 16, 1883, was the valid one, that Wiley had acted in good faith in procuring it, and that he should have the land under his homestead entry made on the day last named. They found with reference to the relinquishment presented by Raymond that it was not procured in good faith, but that it was forged and fraudulent, etc.,

Upon appeal their finding as to the facts was substantially concurred in by you, but their conclusions of law were not approved. You awarded the land to Raymond because he was the first actual settler upon the tract and was there when the Grassick entry was canceled.

The case has been very thoroughly considered here on appeal. I think from the evidence submitted, it is fair to find that the respective relinquishments of the Grassick entry presented by the parties hereto were each obtained in good faith, so far as they were concerned, and for a valuable consideration, each supposing he was buying something of value. Raymond testifies that he paid Grassick \$50 for the relinquishment of his claim, and that Grassick then and there delivered to him his duplicate receiver's receipt and signed the relinquishment endorsed on the back of it. He testifies that he saw him sign it. In this he is corroborated by the witnesses to said signature, Sibley and Porter, who each testify that Grassick signed said relinquishment in their presence, and that he appeared to know what he was doing. As before stated, this transaction took place on the 6th of October, 1883. These statements appear all the more reasonable, when it is shown that prior to the time when Grassick and Wiley appeared together at the local office and the Grassick entry was canceled, to wit: October 15, 1883, Raymond had taken up his residence in the same house that Grassick had formerly claimed and occupied to a certain extent. Raymond with his family has occupied that house ever since.

The local officers and your office did not believe that Grassick ever signed the relinquishment presented by Raymond, basing such belief

upon the fact that his signature thereto did not correspond in all particulars to his admitted signature to several other papers introduced as evidence in the case. I do not think, however, that the question of chirography should control in this case, in view of the uncontradicted and otherwise unimpeached testimony of three persons, especially in view of the fact brought out by a letter from Grassick to one John Martin, introduced into the case by Wiley as evidence, that the writer admitted he had lied so much about this claim that he was getting sick of the business. Grassick himself was not at the hearing, and his whereabouts were then and are now unknown, so far as this record discloses. His conduct in the matter leads very readily to the inference that he was at most a mere speculator in the claim; and as such it is not at all inconsistent to believe that he would execute two relinquishments for the same tract (as I have no doubt he did do), provided he was remunerated therefor.

As regards the Wiley relinquishment, as already indicated, I think it can be readily found that in procuring it Wiley acted in utter ignorance of the prior relinquishment then in the hands of Raymond.

Further, a relinquishment amounts to nothing, so far as releasing the land is concerned, until it is filed, and the purchaser of it can acquire no rights to the land by virtue of his purchase. The only things he can buy are the improvements of a prior settler. His *own* right as a settler must date from the time he made *actual personal* settlement.

Now, what are the facts in this case relative to settlement, improvement, etc., by each party?

I have no doubt from a careful examination of the evidence in the case that Wiley never established residence on this tract until some time in the spring of 1884. During all the time between that date and the time he alleged settlement under his pre-emption declaratory statement his actual home was on what is familiarly called the "McArthur farm," within a mile of the land in question. There he had nearly all his personal effects. That was his fixed abode in the summer, and the place to which he returned each spring after having been lumbering in the woods during the winter season. That farm was cultivated either by him or in his interest. For over two years he had a sort of a claim to the land in controversy, cutting hay there each year, and having a semblance of a house there, formed of rough boards placed slanting against a ridge pole, without floor, window or anything of the kind. He occasionally occupied this shanty when at work on the claim, but such occupation was at best but temporary. He can claim nothing, therefore, prior to the date of this homestead entry, October 16, 1883.

At that date Raymond was an actual settler upon the land. His settlement made and residence established October 15, 1883, could avail him nothing as against the government, or the former claimant prior to the cancellation of the homestead entry then of record. As

against any subsequent settler on the same tract prior to the cancellation of the said entry, his claim would take precedence. *Geer v. Farrington* (4 L. D., 410). If this be true, he certainly would have a better right than a party whose right did not attach as against any one until the cancellation of the homestead entry then of record.

The claim of Wiley not attaching prior to the time he made his homestead entry, to wit, October 16, 1883, that of Raymond clearly is the better of the two. Raymond's right attached as against the government *eo instanti* upon the filing of the Grassick relinquishment October 16, 1883. He was then an actual settler upon the lands with valuable improvements there, and I think on this score the equities are also in his favor.

For the foregoing reasons your decision is affirmed, the entry of Wiley will be canceled, and Raymond's entry allowed.

SETTLEMENT CLAIM—IMPROVEMENTS—FILING.

FREEMAN *v.* CENTRAL PAC. R. R. CO.

The extent of a settlement claim is fairly determined by the location of the improvements and the land described in the declaratory statement.

Acting Secretary Muldrow to Commissioner Sparks, October 4, 1887.

The land involved in this case is the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 29, T 10 N., R. 10 E., M. D. M., Sacramento, California, and is within the primary limits of the grant to the Central Pacific Railroad Company, under the act of Congress approved July 6, 1862, (12 Stat., 489), as enlarged by the act of July 2, 1864, (13 id., 356).

The map of definite location of the company's road past the land in question, was filed June 1, 1863, prior to the act of 1864, and as this land is within the limits of the grant as enlarged by the latter act, the rights of the road attached to it, if at all, at the date of the passage of the latter act.

The township plat was filed in the local office January 1, 1871.

January 13, 1871, Albert Freeman filed pre-emption declaratory statement No. 3372, for the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 32, and the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 29, township and range aforesaid, alleging settlement thereon August 25, 1861. October 22, 1878, he made homestead entry No. 2581, of the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of said section 32.

The SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of said Sec. 29, was listed by the company as a part of the land enuring to it under its grant on July 26, 1883.

December 3, 1884, said Freeman applied at the local office to make an additional homestead entry under the act of March 3, 1879, (20 Stat., 472), of the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of said Sec. 29, accompanying his application with several affidavits alleging said land to have been in his pos-

session as a pre-emptor at and prior to the definite location of the road. He therefore asked that a hearing be ordered.

Hearing was had January 8, 1885, the parties in interest being represented thereat.

Upon the evidence adduced the local officers rejected the application of Freeman, and he did not appeal.

The case was transmitted to your office, under the rules, and on the 20th of April 1885, your office rendered a decision reversing that of the local office, and awarded the land to Freeman under his said application.

The company appealed from said office decision and filed argument in support of said appeal. Freeman has filed nothing in the case since the hearing aforesaid.

The contention on the part of the company that your office had no jurisdiction to examine into the merits of the case in the absence of appeal from the decision of the local office against the claim of Freeman, is answered by the decision of the Department in the cases of *Morrison v. McKissick* (5 L. D., 245) and *Southern Pacific Railroad Company v. Saunders* (6 L. D., 98).

As between the railroad company and the government, it is proper to consider the evidence in the case to ascertain whether the decision of the local officers was correct.

The evidence in the case was meager and not very explicit. I think, however, it is fairly shown that Freeman had a settlement upon part of the land in controversy as early as 1860, and that he has continued to reside either upon the west forty of the tract in controversy or upon said section 32 ever since.

His first improvements seem to have been upon the west forty of the tract in controversy, and upon the NW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of said section 32.

The evidence when considered in connection with other circumstances in the case fairly shows that said NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 32, and said SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 29, were all that he claimed until long after the definite location of the road.

As already stated it was upon these two forties that his improvements were situated; it was for these two forties that he filed his pre-emption declaratory statement soon after the township plat was filed in 1871; and when he made his homestead entry in 1878, he still laid no claim to the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 29; nor did he ever claim it until in his said application in 1884.

From all of which I am of the opinion that said SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 29, was excepted from the railroad grant, and that said SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of same section was not so excepted.

The decision appealed from is modified in accordance with the foregoing.

INDIAN DEED—TREATY OF FEBRUARY 23, 1867.

HEIRS OF PA-PEE-ZE-SEE-WAH.

The approval of an Indian deed required under section twenty-three of the treaty of February 23, 1867, and the regulations adopted in pursuance thereof, was not intended to decide questions of inheritance or constitute a bar to the assertion of the rights of the legal heirs, but to satisfy the Secretary of the Interior that the benefit of the grant would be received by the original reservee or his heirs.

The purpose of such approval was to protect the grantor rather than the grantee, and only assures to the purchaser such title and interest as the grantor possessed.

A deed executed by the lawful heirs of the original reservee—so determined by a tribunal of competent jurisdiction—and in harmony with said treaty should be approved.

The rights of parties, holding under a conveyance from one who had no title or interest to convey, to compensation for improvements placed on the land, must be settled in the courts, and should not delay the approval of a deed executed by the legal heirs.

Acting Secretary Muldrow to the Commissioner of Indian Affairs, October 10, 1887.

I acknowledge the receipt of your letter of 4th instant inclosing . . . Indian deed from Thomas F. Richardville, Mary Richardville, James L. Palmer and Elizabeth Palmer, as heirs of Pa-pee-ze-se-wah, to Hiram Stevens, conveying the SW. $\frac{1}{4}$ of Sec. 19, T. 17 S., R. 24 E., Kansas, 189.07 acres, for a consideration of \$3,000.

This property was conveyed to Erman M. Smith by Felix Waddle and Kingetonsquah, or Louise, as sole heirs of Pa-pee-ze-se-wah, and the deed of conveyance was approved by this Department January 26, 1871; but a decision has been rendered by the circuit court of the United States for the district of Kansas, determining that Mary Richardville and Elizabeth Palmer are the only heirs surviving of the original reservee, and that Felix Waddle and Louise are not the heirs of Pa-pee-ze-se-wah.

It appears that protests have been filed by Attorneys in behalf of Smith, against approval of the deed, until compensation for improvements made by him has been tendered by the legal heirs or their representatives.

On the 6th instant the papers in the case were submitted to the Assistant Attorney General for this Department, and I am in receipt this day of an opinion from his office, wherein it is held that there is seen "no reason why a deed executed by the lawful heirs of the original reservee—so determined by a tribunal having jurisdiction of the question—should not be approved; the approval being simply authority to convey whatever right, title or interest they may have." That office also concurs in your views that the Department has no power to demand that compensation for improvements made by Smith be tendered by the legal heirs or their representatives as a condition to the approval of the

deed, but that the parties should seek their remedy in the proper courts.

In view of this opinion (herewith enclosed) and in accordance with your recommendation, I have approved and return herewith the Stevens deed.

OPINION.

OFFICE OF THE ASSISTANT ATTORNEY GENERAL.

Hon. L. Q. C. LAMAR,

Secretary of the Interior,

SIR: In the absence of the Assistant Attorney General, I have the honor to submit the following opinion upon the questions referred to the Assistant Attorney General by Acting Secretary Muldrow, as to whether, under the facts recited in the letter of the Assistant Commissioner of Indian Affairs of the 4th instant, a deed executed by Thomas F. Richardville, Mary Richardville, James L. Palmer, and Elizabeth Palmer, as heirs of Papeezesewah, a deceased Peoria Indian, conveying to Hiram Stevens the SW. $\frac{1}{4}$ of Sec. 19, T. 17 S., R. 24 E., Kansas, containing 189.07 acres, for a consideration of \$3,000, should be approved by the Secretary of the Interior.

January 26, 1871, the Secretary of the Interior approved a deed conveying the property to Erman M. Smith by Felix Waddle and Kingetonsquah or Louisa, as sole heirs of Papeezesewah the consideration being \$1200.

The approval was based upon the certificate of the then chiefs, Baptiste Peoria and James Charley, that the grantors are the only heirs surviving of the original reservee, and upon other certificates regular in every respect and in full compliance with the rules adopted by the Department to govern the conveyancing of lands assigned in severalty to said Indians.

Subsequently, in a suit brought in the United States circuit court for the district of Kansas by Mary Richardville *et al.* v. George P. Thorp *et al.*, claiming under Waddle and Louisa, a decree was rendered in favor of the plaintiffs; the court holding and deciding that Felix Waddle and Louisa are not the heirs of Papeezesewah, but that Mary Richardville and Elizabeth Palmer, the plaintiffs in the suit, are his legal heirs, and that the approval of the Secretary was not decisive of the question of inheritance or ownership, nor did it tend to divest the legal heir and real owner of his title without his knowledge or consent.

Section twenty-three of the treaty of February 23, 1867, with these Indians (25 Stat., 519), authorized the Secretary of the Interior to remove altogether the restrictions upon the sale of their lands in such manner that adult Indians may sell their own lands, and the lands of minors and incompetents may be sold by the chiefs with the consent of the agent, certified to the Secretary of the Interior and approved by him.

Rules and regulations were adopted by the Secretary governing such conveyances, providing that the deed of conveyance should be executed in the presence of two witnesses, acknowledged before the agent, and accompanied by a certificate signed by two of the chiefs of the tribe to which the reservee belongs, that the grantor or grantors (in case the original reservee be dead) are the only heirs surviving of the original reservee, and that they are of full age and competent to manage their property. The agent is also required to certify that the contents of the deed were known and understood by the grantors; that the consideration specified is a fair price and was actually paid in lawful money; and that the conveyance was in every respect free from fraud or deception.

It was upon evidence of this character that the approval was given to the deed of Waddle and Louisa Smith.

The certificate of the chiefs that the grantors are the only heirs surviving of the original reservee was not decisive of their right and title to the land, nor was the approval of the Secretary based upon such certificate a guarantee to the purchaser of such right and title, but only an assurance of the right of the grantors to convey whatever title or interest they had. Such certificate and approval can not divest the title, nor affect any right of the legal heirs, if made without their knowledge and consent.

It was not the object of the treaty, or of the rules and regulations made for its enforcement, that the Secretary should decide the question of inheritance, or that his approval should be a bar to the rights of the legal heirs, but simply to satisfy the Secretary that the benefit of the grant is being received by the original reservee or his legal heirs; that the grantor is competent to manage his affairs; that he executed the deed; that the price paid is a fair price for the land; and that he actually received the money therefor.

The purpose was to protect the grantor rather than the purchaser, and only assured to the purchaser whatever right, title and interest the grantor had. Without such approval there is no power to sell and convey, but with such approval, the deed conveys all right, title and interest of the grantor.

A decision having been rendered by the circuit court of the United States for the district of Kansas, determining that Mary Richardville and Elizabeth Palmer are the only heirs surviving of the original reservee, and that Felix Waddle and Louisa are not the heirs of Papeezesewah, I can see no reason why a deed executed by the lawful heirs of the original reservee—so determined by a tribunal having jurisdiction of the question—should not be approved; the approval being simply authority to convey whatever right, title or interest they may have.

As to the remaining question—that the approval be withheld until compensation for improvements made by Smith has been tendered by

the legal heirs or their representatives—I concur in the views of the Acting Commissioner, that the Department has no power to demand such compensation as a condition to its approval, but that the parties should be remanded to the courts for their remedy.

Very respectfully,

E. F. BEST,
Chief of Law Division.

HOMESTEAD CONTEST—RESIDENCE.

GRIMSHAW v. TAYLOR. (On Review.)

The absence of the entryman, or his family, from the land may be satisfactorily explained where it is evident that the entry was made in good faith and for the purpose of acquiring a home.

Acting Secretary Muldrow to Commissioner Sparks, October 21, 1887.

I have considered the application filed by Grimshaw for review and reconsideration of departmental decision, dated January 20, 1886, (4 L. D., 330) in the case of William Grimshaw v. Lorison J. Taylor, involving homestead entry No. 930, made by the latter on the SW. $\frac{1}{4}$ of Sec. 20, T. 139 N., R. 73 W., Bismarck, Dakota.

Said decision was an affirmance of your office decision of March 18, 1885, dismissing Grimshaw's contest, which was initiated on the general charge of abandonment and change of residence. The record in the case has again been carefully examined and the facts disclosed by the evidence, in my judgment, fully justify the conclusion arrived at in the decision a review of which is sought.

I am still clearly of the opinion that Taylor made his entry in good faith, with the intention of making the tract in question his home, and am satisfied that since making said entry he has had no other home. His absences, and the absence of his family for a time, have in view of all the circumstances of the case been satisfactorily explained, and in my judgment in no way impugn his good faith.

His wife and children were by the illness (insanity) and subsequent death of her father, prevented from going on the land when claimant first went there; but within three days after her father's burial in Michigan, she with her three children left for Dakota, and went on the land and into a good house which claimant had erected soon after his entry.

Finding no reason for disturbing the departmental decision rendered January 20, 1886, in the case, the same is adhered to and the motion is denied.

FINAL PROOF—SPECIAL AGENT—FINAL CERTIFICATE.

LEONARD F. CASE.

The adverse report of a special agent having been filed prior to the offer of final proof such agent should be present when the same is offered, for the purpose of objecting thereto, if necessary, and cross-examining the witnesses.

Until all the preliminary acts required by the law are performed, a claimant for land under any of the public land laws acquires no right against the government, and the title to the land remains under its control.

Acting Secretary Muldrow to Commissioner Sparks, October 21, 1887.

I have considered the appeal of Leonard F. Case from your decision dated January 15, 1886, holding for cancellation his commuted home stead entry, cash certificates No. 5148, for the SE. $\frac{1}{4}$ of Sec. 6, T. 121 N. R. 54 W., Watertown, Dakota.

The record shows that appellant made homestead entry No. 5296, June 30, 1881, for the tract described, and that after due advertisement he on November 14, 1883, made final proof and commuted the same to cash entry.

It appears that prior to any offer to make final proof, to wit, July 17, 1883, E. G. Fahnestock, then a special agent of your office on duty in the land district where this land is situated, made a report to your office to the effect that the law was not being complied with in the matter of residence. On that report your office on the 17th of January, 1884, held the homestead entry for cancellation. At this date it appears your office had not been informed of the commutation to cash entry. Subsequently, on application of claimant, a hearing was ordered and had, special agent Fahnestock being present to represent the government. On the evidence taken at the hearing the register and receiver found in favor of the entryman and gave it as their opinion that the entry should not be canceled.

The register by letter of August 7, 1885, transmitted to your office the record in the case, and upon an examination of the same you found from the evidence that the claimant failed to show that he had ever established or maintained an actual residence upon the tract, and that the improvements were not such as would indicate an intention on his part to make his home there. You therefore reversed the finding of the local office and held the entry for cancellation. From that judgment claimant appeals.

Upon examination of the record I find the testimony quite conflicting on the question of residence. It is clear that claimant spent a considerable portion of his time in Waubay, where he was in business as a druggist, and was assistant post-master during a portion of the time covered by his homestead entry. Waubay is about two miles from the tract in question. Claimant and his witnesses testify that while so

engaged it was his practice to drive out to the land and remain there nights, returning to Waubay and to his business each morning. He states that his wife accompanied him on his trips back and forth because she was afraid to stay alone on the homestead.

Witnesses for the government testify that they seldom saw claimant at his homestead, and that when he was there it was on mere visits. The evidence shows that he had a fairly good frame house and a stable on the tract; that there was considerable of household goods in the house all the time, and that there were broken about six acres of the land.

Upon the record as made I do not feel justified in rendering a judgment cancelling the entry, neither am I satisfied that a bona fide residence such as the law requires has been shown. I therefore think, the matter being solely between claimant and the United States, that appellant should have an opportunity at any time within the life time of his entry to make new proof, after due notice, showing full compliance with the law, his final certificate in the mean time remaining suspended. Your decision is modified accordingly.

It has already been stated that the special agent made his report upon which your office first held this homestead entry for cancellation, in July, 1883, and that claimant after the usual published notice, made final proof which was accepted, the cash received for the land, and certificate issued November 14, 1883.

It would seem proper in such cases for the special agent to be present when final proof is offered in order to object if necessary to the acceptance of the proof, and to cross examine witnesses. Had such a course been pursued in this case it is not probable that the money would have been taken for the land and final certificate issued. At least such action would not have been taken without a full hearing.

Counsel for appellant strenuously argues in this case, that said appellant, having made his commutation proof, paid for the land and received final certificate, the title is vested in him and the land department has no legal authority or right to cancel such certificate and entry; that such cancellation can legally be made only after and pursuant to judgment of a court of competent jurisdiction.

In other words he argues that the issuance of a final certificate is equivalent to the issuance of patent in this regard. Argument on this point is not deemed necessary, it having been so long and so uniformly held by this Department that until all the preliminary acts required by the law shall have been performed, a claimant for land under any of the public land laws acquires no right against the government, and the title to the land claimed remains under its control. See case of *United States v. Johnson et al.* (5 L. D., 442) and cases therein cited.

HOMESTEAD SETTLEMENT—ACT OF MAY 14, 1880.

WAY *v.* MATZ.

The homestead entry of a settler under section three of the act of May 14, 1880, relates back to the date of settlement, and the intervening entry of another must be held to have been made subject to the superior right of the homestead settler. If the land is in a county attached for judicial purposes to another county, the clerk of the latter is the proper officer before whom to make the affidavit required in section 2294 R. S.

An entry, based on a preliminary affidavit executed before a clerk of court not authorized to act in such matters, is voidable only, and the defect may be cured by supplemental affidavit.

Acting Secretary Muldrow to Commissioner Sparks, October 21, 1887.

I have considered the case of Charles A. Way *v.* Peter Matz, involving the SW. $\frac{1}{4}$ of Sec. 26, T. 113 N., R. 79 W., Huron district, Dakota, appealed by Way from the decision of your office, dated November 14, 1885, holding his entry for cancellation and allowing Matz to make commutation proof.

It appears that Way made a homestead entry on said tract November 3, 1883, and that two days afterwards Matz also made a homestead entry thereon. Subsequently, Matz attempted to make commutation proof and Way protested. A hearing was ordered by your office, in order that the respective rights of the parties might be determined, and by agreement between them testimony was taken December 19, 1884, and from day to day thereafter till the same was completed.

The evidence satisfactorily shows that prior to the date of Way's entry, Matz settled upon the land in controversy, with the intention of claiming the same under the homestead laws, and that within the time allowed by law he filed his application in the Huron land office, and caused his claim to be put on record, in conformity with section three, act of May 14, 1880 (21 Stat., 140). His entry though subsequent to that of Way's related back to the date of his settlement, the same as if he had settled under the pre-emption laws, and it was not necessary in order to render his entry valid that the Way entry should have been first canceled, as contended by the appellant. Under said act of May 14, and under the facts as found in this case, Way's entry must be held to have been made subject to Matz's previously acquired settlement rights.

This disposes of all of appellant's assignment of errors, except the third. He insists that Matz's entry was irregular and unauthorized by law, and was consequently void, because the affidavit of qualification required by Sec. 2290 of the Revised Statutes was neither made before the register or receiver, as required by said section, nor before "the clerk of the court for the county in which the applicant is an actual resident," as required in certain cases by Sec. 2294 of the Revised Statutes.

It appears that the tract of land in controversy is in Sully county, and Matz at the time he made his affidavit swore that he was then residing on the land. The officer before whom this affidavit was made in his jurat describes himself as "clerk of the court for Hughes county," and Matz, at the hearing, swore that his affidavit was made before the clerk of court for Hughes county. Matz's attorney, in his argument, says that it is a fact well known to Way's attorneys that, when this affidavit was made, Sully county was attached to Hughes county for judicial purposes, and that the clerk of the district court for Hughes county was also clerk of said court for Sully county. No testimony as to this fact appears in the case, the point having first been made on appeal to the Commissioner of the General Land Office. If it is a fact that the clerk of the court for Hughes county was also clerk of the court for Sully county, there was no irregularity in the matter complained of, and Matz will be permitted to show the fact on making his commutation proof. If the fact is otherwise, it was an irregularity which rendered the entry not void, but only voidable. (St. Paul, M. & M. Ry. Co. v. Forseth, 3 L. D., 446; and Roe v. Schang, 5 L. D., 394.) And the appellee not having had his attention called to the supposed defect at the hearing, will be allowed thirty days from the receipt of notice of this decision within which to file a supplemental affidavit of qualification before the proper officer.

As modified herein, your decision is affirmed.

PRE-EMPTION ENTRY—RESIDENCE.

LULU M. MARSHALL.

While it is true that residence cannot be acquired by occasional visits to a tract, with no intention of making the same a home, yet a residence may be established the instant a settler goes upon the land with the intention in good faith of making his home there to the exclusion of one elsewhere.

Acting Secretary Muldrow to Commissioner Sparks, July 25, 1887.

I have considered the case of the United States v. Lulu M. Marshall, as presented by the appeal of the latter from the decision of your office, dated December 18, 1885, holding for cancellation her pre-emption cash entry No. 1213 of the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 7, and S. $\frac{1}{2}$ of SW. $\frac{1}{4}$ and SW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of Sec. 8, T. 122 N., R. 65 W., made March 24, 1883, at the Aberdeen land office, in the Territory of Dakota.

The record shows that Miss Marshall filed her pre-emption declaratory statement No. 9788 for said land on September 20, 1882, alleging settlement thereon July 4, 1882. On March 24, 1883, after due notice, she offered final proof and payment for said tracts, which was accepted by the local land officers and final certificate issued thereon.

The final proof showed that the claimant was a single person, duly qualified to make said entry; that she settled upon said tract at the

time stated in her declaratory statement, established residence thereon same day; that her improvements consist of a frame house, eight feet by ten, a barn, same size, and six and a half acres of breaking—all worth \$150. With said formal proof was filed a special affidavit of the claimant, duly corroborated, setting forth that she settled upon said tract as stated; that she resided thereon for two months continuously; that she went to St. Paul, Minnesota, on account of her ill health and remained there for thirty days; that she then returned to her claim and remained thereon for some days; that on account of her ill health she was obliged to return to Saint Paul, and since that time has been unable to reside on the land. The claimant also filed the certificate of her physician, to the effect that she was under his professional treatment from the 20th day of October, 1882, until March 22, 1883, and that during that time claimant has not been "able to go to her home in Dakota."

On December 4, 1883, a special agent of your office reported said entry for cancellation, for failure on the part of the claimant to comply with the law, and because the entry was "speculative from its inception."

On May 12, 1884, your office directed the local land officers to order a hearing to determine the truth of said charges. It appears that testimony was taken in said case on August 7, 1884, and action thereon suspended under general orders, and again proceeded with by order of your office, and testimony was taken on May 20, 1885. From the evidence taken before the local land officers, they found that there was "no reason to conclude that there was any fraudulent intent on the part of the claimant"; that the charge was not sustained and that said cash entry ought to be approved. Your office, however, refused to concur in the action of the local land officers, and held that the claimant's own testimony shows that she never established an actual residence upon said land; that she does not allege that she ever cultivated any portion of the same to crop; that her ill health can not dispense with the requirement of residence and cultivation, and that if the claimant had acted in good faith, and really intended to make her home upon the land, "she would not have been so hasty in making final proof."

It is to be observed that the final proof was made more than eight months after settlement and hence more than two months after the time within which claimant was entitled to make said proof under the rules and regulations of this Department.

The claimant testified at the hearing that she established her residence on said land on July 6, 1882, and continued to reside thereon without interruption until the 20th of September, 1882, when she left and went to St. Paul, and returned to the land on the 30th of October, 1882, and remained thereon from three to four days at that time; that she then returned to St. Paul and remained until about the 18th or 20th of November, when she came back and remained about three days; that she intended to come back to the land in the month of December, but was prevented by a severe cold, and that her physician advised her not

to go to her claim, as it would endanger her health. The claimant further swears that it was generally understood in the vicinity of the land that such a residence as she maintained was a compliance with the requirements of the pre-emption law; that she entered said land for her own use, and not for the use of any other person; that she earned her own support during the time she held said claim prior to and since making final proof, by teaching in Minneapolis; that after making her final proof she did not remove or cause to be removed her shanty on the land, but the same was stolen. The claimant's testimony is corroborated as to her residence and good faith by two witnesses, one of whom swears that claimant had a house upon the land that "was very tasty and neat," with a carpet on the floor and curtains up to the windows, while the other witness says that "this shanty was better than nine out of ten of the shanties built here."

The special agent testified to the statements made in his report upon which said hearing was ordered, that upon the statements made to him he judged that the improvements were worth thirty-five dollars; that from the affidavits made to him by settlers, who lived in the vicinity, he was of the opinion that said entry was not made for the claimant's use and benefit, but that having heard the testimony of the claimant he now has "no reason to believe that the claim was taken for speculation."

A careful examination of the whole record will not warrant the cancellation of said entry.

It is nowhere shown that the claimant has concealed any facts, or has intentionally testified untruthfully. While it is true that residence can not be acquired by occasional visits to a tract, with no intention of making the same a home to the exclusion of one elsewhere, as was held by this Department in *Fagan v. Jiran* (4 L. D., 141); *Strawn v. Maher* (ibid., 235); *Elliott v. Lee* (ibidem, 301); yet a residence may be established the instant a settler goes upon the land with the intention in good faith of making his home there to the exclusion of one elsewhere. *Goodnight v. Anderson* (2 L. D., 624), *Grimshaw v. Taylor* (4 L. D., 330).

The claimant and her witnesses swear that she established her residence in good faith upon said land, the special agent of the government admits that said entry is not fraudulent, and the local officers, with the witnesses before them, have found in favor of the claimant, and they recommend that said entry be approved for patent.

While I do not think the facts as shown by the record show bad faith on the part of the claimant, yet I am not satisfied that upon the proof submitted said entry should be passed to patent. The claimant will be allowed to make supplemental proof within a reasonable time, showing full compliance with the requirements of the pre-emption law, and the regulations of this Department. In the meantime, the entry will remain suspended.

The decision appealed from is modified accordingly, and the papers in the case are herewith returned.

MINING CLAIM—POSSESSORY RIGHT.

MONTANA COMPANY.

In the absence of a clear showing of possessory right an application for patent must be denied.

Acting Secretary Muldrow to Commissioner Sparks, October 24, 1887.

The application of the Montana Company for patent to the Concentrating Works mill site is before me on appeal from your office decision of August 11, 1885, wherein you refuse said application, and hold the entry for cancellation.

The record shows that the Montana Company claim title (by location dated, September 16, 1876, and duly recorded), to certain lands situated in T. 7 N., R. 4 W., Helena, Montana, and August 8, 1882, the said company made mineral entry 865, for 499 acres for the said Concentrating Works mill site.

The abstract of title duly filed discloses that September 9, 1879, the said Montana Company made deed to the Alta Montana Company, of all its right, title and interest in said mill site.

November 27, 1879, the Montana Company filed its application for patent.

The president of the Helena Mining and Reduction Company to whom the said Alta Montana Company appears to have made deed February 22, 1884, of all its right, title, and interest to said mill site, filed September 25, 1885, in the local office, his corroborated affidavit to the effect that the Alta Montana Company grantee as aforesaid, was a reorganization of the said Montana Company, and that the said Helena Mining and Reduction Company was the successor of the said Montana Company.

Accompanying said affidavit is the petition of the Helena Company that the patent issue to that company, for the reason stated. That both said affidavit and petition have been before you is evidenced by your letter of December 12, 1885, refusing said petition.

There is no evidence other than said affidavits of parties in interest that the Alta Montana Company was a reorganization of the Montana Company as stated, while it does appear that the articles of incorporation of the former company, were filed July 16, 1879, in the city of New York, and in the office of Secretary of Montana August 21, 1878.

I am satisfied from the record that the Montana Company fails to show such possessory rights as is required by law and regulations of the Department at the date of its application for patent, and concur in your conclusion that the same should be rejected. Sec. 2325 and 2337 U. S., Revised Statutes, paragraph 32, mineral circular approved October 31, 1881.

The claim of counsel that the application should be considered as having been made August 2, 1882, the date of application for survey, is without force.

Your decision is affirmed.

PRIVATE CASH ENTRY—EQUITABLE ADJUDICATION.

WILHELM BOEING.

Although the order restoring these lands to entry limited their appropriation to applicants under the homestead or pre-emption law, yet as the tract herein had been "offered" a private cash entry thereof may be sent to the Board of Equitable Adjudication, there being no adverse claim or indications of bad faith.

Acting Secretary Muldrow to Commissioner Sparks, October 25, 1887.

I have considered the appeal of Wilhelm Boeing from the decision of your office, dated August 3, 1885, holding for cancellation his private cash entry No. 12,881 of the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 31, T. 43 N., R. 36 W., made December 9, 1881, at the Marquette land office, in the State of Michigan.

Your office held said entry for cancellation, for the reason that said land had been restored to entry only under the homestead and pre-emption laws, and hence not subject to private cash entry.

On November 14, 1885, your office refused to reconsider said decision, holding said entry for cancellation upon the following grounds:

(1) That the land covered by said entry was withdrawn from market for the adjustment of the grant by act of Congress approved June 3, 1856 (11 Stat., 21), to the State of Michigan to aid in the construction of a railroad from Little Bay de Noquette to Marquette, etc.; that said land was approved to said State for the benefit of said road, on December 24, 1862; that said certification of said land was in effect annulled by the act of Congress approved March 3, 1865 (13 Stat., 520); that your office, on September 1, 1879, recommended that said tracts be restored to entry, and in accordance with such recommendation, the land was restored to homestead and pre-emption entry on September 12, 1879.

The appellant insists that the land covered by said entry was restored to market on June 15, 1868, by Public Notice No. 727, and hence the order of your office holding that said lands were subject to entry only under the homestead and pre-emption laws was erroneous.

An inspection of the records of your office fails to sustain the allegation of counsel for the appellant. But, inasmuch as said land has been once offered, and there being no adverse claimant and no indication of bad faith, I am of the opinion that said entry is not void, but voidable, and that it may properly be submitted to the Board of Equitable Ad-

judication for confirmation under the appropriate rule. *Pecard v. Camens* (4 L. D., 152).

You will please submit said entry to the Board in due course of business. The decision of your office is modified accordingly.

FINAL PROOF—STATUS OF MORTGAGEE.

GEORGE B. THOMPSON.

The sale or encumbrance of the land after final proof brings no new element into the case when the validity of the entry is under consideration, though the purchaser or mortgagee is accorded the right to show that the entryman had in fact complied with the law.

There is no authority of law for the substitution of the mortgagee in the place of the entryman.

Acting Secretary Muldrow to Commissioner Sparks, October 25, 1887.

In the matter of the proceedings had with respect to the homestead entry of George B. Thompson, of the NE. $\frac{1}{4}$ of Sec. 6, T. 147, R. 55 W., Fargo, Dakota, a motion for review of the departmental decision of August 5, 1887, has been filed on behalf of Louise C. French, a mortgagee, claiming an interest in said land.

It appears from the decision above referred to that said mortgagee was present in person and represented by counsel at the hearing held under the order of your office and had due opportunity to furnish such evidence as might be desired in support of the validity of said entry.

The motion does not raise any new question or matter pertinent to the issue not fully considered in said decision.

The sale or encumbrance of the premises subsequent to submission of final proof does not bring any new element into the case when the validity of the entry is under consideration, though the purchaser or mortgagee is accorded the right to show that the entryman had in fact complied with the law, and that the entry should therefore not be disturbed. *R. M. Sherman et al.* (4 L. D., 544); *John C. Featherspil* (id., 570).

It is asked on behalf of said mortgagee that, if the said entry can not be confirmed, she be allowed to show her interest in the land and perfect her title thereto. There can be, however, under the law no recognition of said mortgagee, except as above indicated, and if the entry is canceled, the right of the mortgagee to be heard therein is at an end, as there is no authority of law for the substitution of the mortgagee in the place of the entryman.

The showing made for review being insufficient, the motion therefor is accordingly denied.

TIMBER CULTURE ENTRY—AMENDMENT.

BRACKEN *v.* MECHAM.

A pending application to amend an entry constitutes a reservation of the land applied for.

Acting Secretary Muldrow to Commissioner Sparks, October 22, 1887.

January 29, 1884, Manford S. Mecham made timber culture entry for the S. $\frac{1}{2}$ of NE. $\frac{1}{4}$, SE $\frac{1}{4}$ of NW. $\frac{1}{4}$, and NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$, Sec. "19," T. 6 N., R. "27" W., McCook, Nebraska. June 17, 1884, Charles M. Bracken made timber culture entry for the NE. $\frac{1}{4}$ of Sec. 10, T. 6 N., R. 28 W.

By letter, dated July 26, 1884, your office allowed Mecham to so amend his entry as to embrace (in lieu of the tract named in his said entry) the S. $\frac{1}{2}$ of NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ and NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$, Sec. "10," T. 6 N., R. "28" W.

Subsequently to said amendment, to wit, October 15, 1884, one Callas O. Smith made homestead entry for the NW. $\frac{1}{4}$ of Sec. 10, T. 6 N., R. 28 W.

October 18, 1884, Louis H. Winter made application for homestead entry upon the NW. $\frac{1}{4}$ of NW. $\frac{1}{4}$, and N. $\frac{1}{2}$ of NE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, Sec. 10, township and range aforesaid, which application was rejected by the local officers, because of the said prior entries.

Your letter of October 13, 1885, holds Bracken's entry for cancellation, and also that of Smith as to the SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, for conflict with the amended entry of Mecham.

With reference to the homestead application of Winter, which conflicts with the entries of Bracken and Smith, you direct the local office "to order a hearing to determine the rights of the parties." The record shows no appeal by Smith from your said decision.

The hearing was held by the local officers January 11, 1886, and the testimony tending to show continuous residence from October 1, 1884, with improvements by said Winter, is forwarded with the papers in the case. This testimony not having been before you at the date of your decision, has not been considered.

The case is now before me on the appeal of Bracken from your said decision of October 13, 1885.

Bracken's timber culture entry of June 17, 1884, made during the pendency of Mecham's application (filed April 28, 1884,) to amend, is clearly invalid. The Department has held that a pending application to amend an entry constitutes a reservation of the land so applied for. *Florey v. Moat* (4 L. D., 365); *Johnson v. Gjevre* (3 L. D., 156).

It appearing that Bracken was allowed to make his entry in ignorance of the said pending application, he should be allowed to retain the N. $\frac{1}{2}$ of NW. $\frac{1}{4}$, not in conflict with Mecham's amended entry, or to have his entry canceled as he may elect.

Your decision is modified as stated.

FINAL PROOF—CERTIFICATE—JURISDICTION—EVIDENCE.

EDWARD WISWELL.

The approval of final proof, and issuance of certificate thereon by the local office, in no way limits the authority and jurisdiction of the Department over the entry. The only pre-requisite required by law to give the local office jurisdiction is "due notice to the settler."

An unsworn statement of a special agent should not be considered in evidence.

The willful suppression of material facts taken in connection with the effort to prove up in the shortest possible time, while alleging poverty, nullifies all claims of good faith.

In *ex parte* proceedings oral arguments are not encouraged except in special cases, and good reasons shown therefor.

Acting Secretary Muldrow to Commissioner Sparks, October 25, 1887.

I have considered the appeal of Edward Wiswell from your office decision of September 25, 1885, refusing to reinstate his homestead entry No. 9283 (commuted to cash entry No. 6029), for SE. $\frac{1}{4}$ of Sec. 24, T. 135 N., R. 61 W., 5th P. M., Fargo, Dakota, land district.

Wiswell made his entry November 5, 1881, and on January 24, 1883, offered final proof on commutation thereof. This proof not being satisfactory to the local officers, it was supplemented by entryman's affidavit, dated February 12, 1883, when it was approved and final certificate issued. Afterwards Special Agent McIlvain made a report on this claim, stating that he examined it June 9, 1883, and found no improvements thereon, except about four acres of breaking, whereupon the entry was by your office held for cancellation.

Wiswell applied for reinstatement, and a hearing was ordered, which was, after numerous delays, held April 21, 1885. The entryman appeared in person and by attorney, and moved to dismiss, which motion was overruled. Testimony was submitted by the government, Wiswell refusing to cross-examine the government's witnesses, or to produce any on his own behalf. At the close of the examination, Wiswell, by his attorney, renewed his motion to dismiss. The local officers rendered no decision, but transmitted the papers to your office, where, on September 25, 1885, a decision was rendered, wherein you say: "The claimant has failed to show any cause why his entry should be reinstated, and in view of the facts shown, I adhere to the former action of this office in cancelling said entry."

From this decision Wiswell appeals.

As the reasons advanced by the entryman in support of his motion to dismiss the hearing are substantially the same as those urged in his argument filed in support of his appeal, it is unnecessary to enter upon a separate discussion as to the merits of that motion.

The argument advanced by appellant in support of his appeal is directed to the support of the proposition that there is no authority in the Department to cancel an entry after the approval of final proof by

the register and receiver, and the issuance of final certificate thereon. After a careful examination of the list of authorities, cited by appellant, I find no reason for changing the views heretofore expressed on this subject by the Department. It is only necessary to cite the case of *United States v. Johnson* (5 L. D., 442), and the authorities there cited, to show that the rule is well settled that the Department has such right and authority.

To the objection that the complaint in this case was not sufficient to give the local officers jurisdiction, it is only necessary to say that the only prerequisite required by law to give the local office jurisdiction is "due notice to the settler." *Houston v. Coyle* (2 L. D., 58); *Doty v. Moffatt* (3 L. D., 278).

At the hearing but one witness was examined as to the condition of the claim and the improvements thereon. He first visited the land in June 1883, in company with special agent McIlvain, and found there three to four acres of breaking sowed to grain, a building eight by twelve feet of rough boards, shed roof, the only means of access being an opening like a window about two feet square and about the usual height of a window from the ground, its only contents being some hay and a scythe; a well ten or twelve feet deep and the remains of some sod walls. He estimates the value of breaking \$28, house \$35 to \$40, well, \$13. This witness says the land is about seven miles from Grand Rapids.

The other witness, Albert E. Franks of Grand Rapids, who was register of deeds for LaMoure County, states that Wiswell was in his employ from some time in September 1882, to August 1883, and boarded with him in Grand Rapids during that period.

Special agent McIlvain made at the hearing a statement which is incorporated with the testimony. This statement is not made under oath, and is therefore wrongly incorporated as a part of the testimony and can not be considered in arriving at a conclusion in the case. Upon the facts as above set forth, established upon the hearing, and the statements of claimant himself as set forth in his final proof, and in two affidavits, one made February 12, 1883, and the other January 17, 1885, this case must be decided.

In his final proof Wiswell states that he resided upon the land continuously from May 15, 1882, until November 15, 1882, and that he was absent after November 15th attending to his duties as deputy county clerk. In his affidavit of February 12, 1883, he states that he did not mean by those statements in his final proof, that he had abandoned the land and changed his residence therefrom, but that he had been absent therefrom a large portion of the time attending to his duties as deputy county clerk of LaMoure County; that he was without means, and on November 15, 1882, he secured employment for the winter with Albert E. Franks, county clerk of LaMoure County; that while at work he boarded with his employer, but was repeatedly upon said land and made the same his place of residence and his home, and remained thereon as

much as his said business would permit. In his affidavit made January 17, 1885, Wiswell contradicts the allegations of his two former statements in several material points. He says in this affidavit that he went on the land in April or May 1882, and plowed five acres and planted it to potatoes and garden; pitched his tent and built a sod stable, remaining there about three weeks, when he was obliged to go to a neighbors three miles distant to obtain better water, help, and quarters for his sick horse; that about this time he built a house on his claim eight by twelve feet, or ten by fourteen feet; that in July he put up about twelve tons of hay and cultivated and hoed his potatoes and garden; that in the month of July or August one of his horses died, and being unable to buy another to make up a team he sold his remaining horse. At this time being out of money he went to work on a railroad being graded through that county, and worked there about three weeks when he came back dug and buried his potatoes; that on October 15th he hired out to A. E. Franks, register of deeds; that in the latter part of October he built a stable about fourteen by sixteen feet or larger and dug a well; that he went out on his claim every few days; that during the month of March or April 1883, his stable blew down and the lumber was stolen as were also the poles from his sod stable; that he cropped his claim in the summer of 1883 to oats.

In his final proof he alleges the building of a house May 15th as his first act of settlement, while in this affidavit he says he was on the land three weeks in a tent before building a house. In his final proof he says he lived on the land continuously from his first settlement until November 15, following, while in this affidavit he admits leaving the claim three weeks after the first settlement and about the time he built the house, and there is nothing to show that he was ever on the claim after that to remain over night. In his final proof he states that he begun to work for Franks November 15th, and in his last affidavit he fixes the time as October 15th, while Mr. Franks says he employed him in September. It is quite clear that Wiswell in his final proof, wilfully suppressed the facts as to his residence, which taken in connection with his effort to prove up and pay for the land in the shortest possible time, although claiming that he was a poor man and had no means to enable him to live on and improve the claim, nullifies all his claims of good faith.

Without a clear showing of good faith on the part of the claimant, the facts appearing are not sufficient to entitle him to a patent. His attorney in the argument filed virtually admits that Wiswell has not brought himself within the rules laid down by the Department, and seeks to attack the validity of these rules. Your decision is affirmed.

Under the rule laid down in the case of George T. Burns (3 L. D., 561), where it is said "in ex-parte cases oral arguments are not encouraged, except in special cases, and good reasons shown therefor," it was deemed unnecessary to grant the request of appellant's attorney for the privilege of arguing this case orally.

PRACTICE—RIGHT OF AMENDMENT—GROUND OF CONTEST.

WHITE v. MCGURK ET AL.

A case should not be dismissed without notice, and prior to the day set for hearing. If the affidavit of contest is defective the right of amendment will be accorded on due application therefor.

An offer to sell the land entered is not sufficient ground to warrant contest.

The offer to sell may be proven in support of a charge that the entry was speculative and fraudulent, as may also the fact of procuring a friendly contest against the entry.

Secretary Lamar to Commissioner Sparks, November 3, 1887.

I have considered the case of John S. White v. John McGurk and Andrew Gannon, on appeal by Gannon from your office decision of January 13, 1886, directing the local officers to proceed with the hearing on White's affidavit of contest against McGurk's timber culture entry No. 9721, for the SE. $\frac{1}{4}$ of Sec. 30, T. 105 N., R. 68 W., Mitchell, Dakota land district, and to hold Gannon's application to contest same entry subject to the disposition of White's contest.

McGurk made timber culture entry for said land August 4, 1882, and on June 29, 1885, White initiated contest, alleging failure to plant ten acres the third year; that entryman had been and was then trying to sell his claim, and that he was trying to get the claim covered by a friendly contest. The local officers accepted this application to contest, and set the hearing for August 20, 1885.

On August 5, 1885, the attorney for Gannon appeared at the local office, and on his motion without notice to him, White's contest was dismissed and Gannon's application to contest allowed. White appealed, and on January 13, 1886, you reversed the decision of the local officers, directed that a hearing be had on White's contest, and that Gannon's application to contest be held subject to the disposition of White's contest. From this decision Gannon appealed.

It was clearly error in the local officers to dismiss White's contest without notice and before the day set for hearing. If the affidavit was defective the right to amend it would have been accorded the contestant upon application therefor upon the day set for the hearing. *Hanson v. Howe* (2 L. D., 220). *Gotthelf v. Swinson* (5 L. D., 657).

I cannot concur with you that an offer to sell is a ground for contest. I must adhere to the views as expressed in the case of *Sims v. Busse et al* (4 L. D., 369) and approved in the case of *Gilbert E. Read* (5 L. D., 313), where it was said: "It is not sufficient to allege in the contest affidavit that the entryman had repeatedly offered said land for sale to different persons and that same is now and has been held solely for speculation. Such an allegation does not necessarily contradict the affidavit required by the statute."

The fact that the entryman has offered his claim for sale is a circumstance that may be proven to sustain an allegation that the entry was speculative and fraudulent, as may also the fact that the entryman has procured or tried to procure the initiation of a friendly contest against the claim to protect it from other contests.

I concur with you that White's contest should be regularly disposed of under the rules of practice, and that Gannon's application to contest must be held subject to such disposition of the prior contest, and your said decision is therefore affirmed.

PRACTICE—NOTICE—APPEARANCE.

DEAKINS v. MATHESON.

An appearance entered by an attorney is general in the absence of expressed limitation, and if authorized by the defendant cures any irregularity in the service of notice.

When an attorney enters his appearance his authority for such action will be presumed—unless a different rule is prescribed—but the presumption is not conclusive, and the authority of the attorney may be inquired into either at the request of the opposite party, or by the court on its own motion.

In service by publication notice by registered letter is an essential, without which jurisdiction is not acquired, and must be given within the time required by the rules of practice.

Secretary Lamar to Commissioner Sparks, November 5, 1887.

I have considered the case of Sue E. Deakins *v.* Angus Matheson, as presented by the appeal of the latter from the decision of your office, dated August 11, 1885, holding for cancellation his timber culture entry No. 489½ of the SE. ¼ of Sec. 8, T. 139 N., R. 73 W., made May 24, 1882, at the Bismarck land office, in the Territory of Dakota.

The records of your office show that Ferdinand Kramer made timber culture entry, No. 60, of said tract on June 15, 1878, which was canceled on April 11, 1882; that Henry S. Wright made timber culture entry, No. 463, of the same tract on April 22, 1882, which was canceled by relinquishment on May 24th, same year. The record in this case shows that the said Sue E. Deakins filed her affidavit of contest against said entry, alleging that said entryman had failed to cultivate, or to cause to be cultivated to crop or otherwise five acres of said land during the second year after making said entry; that he failed to break or plow or to cause to be broken or plowed five acres or any portion of said land during the second year of said entry, and that he has wholly failed to cultivate or cause to be cultivated to crop or otherwise any part of said land since making said entry.

Notice issued by publication, summoning the parties to appear before the probate judge of Kidder county, in said Territory, on July 7, 1884.

On July 5, same year, there was filed in the local land office the following notice, to wit:

BISMARCK, DAKOTA, July 5, 1884.

Hon. J. A. REA,

Register U. S. Land Office, Bismarck, D. T.,

SIR: Please take notice that I hereby enter my 'appearance' for the defendant in the case of Sue E. Deakins *v.* Angus Matheson, involving the SE. $\frac{1}{4}$ of Sec. 8, Town 139, Range 73, Kidder county, Dakota Territory, now pending in your office.

O. F. DAVIS,

Attorney for Angus Matheson.

The record shows that the contestant was represented by counsel at said hearing, who had previously filed his said appearance in the local land office. It appears, from the statement of the officer taking the testimony, that the attorney for the contestant inquired of the attorney who had entered his appearance for the defendant, if he appeared at the request of claimant, or at the request of some other person. The attorney for defendant refused to state for whom he appeared, on the ground that his appearance had been entered in accordance with the rules of practice of the land department, which do not require him to state by whose authority he appears in said case.

The record further states that the defendant entered a special appearance in said case, and moved to dismiss the contest, on the ground of insufficiency of notice, to wit, that it does not appear "that notice by registered letter was served thirty days prior to the day set for the trial, as required by rule 14 of the rules of practice of the land department."

The trial was proceeded with, each party offering testimony. From the evidence submitted the local land officers held that the contest must be dismissed, (1) because the notice was not given by registered letter in accordance with said rule of practice; (2) that if the notice was properly served, the evidence failed to show non-compliance with the requirements of the timber culture law, as set forth in said affidavit and notice of contest; and (3) that since there is no charge of abandonment, or of an offer to sell the right of the claimant to said land, the evidence does not warrant the local land officers in the conclusion that the claimant could not now go on and perfect his entry and reap the benefit of the breaking and cultivation already upon said land.

On appeal, your office reversed the conclusion of the local land officers, and held that the action of the attorney for the claimant, refusing to state by what authority he appeared, was correct, upon the authority of *Carduff v. Cormack* (9 C. L. O., 9); that the motion to dismiss said contest should have been overruled, for the reason that the record shows that said attorney entered a general appearance which had not been withdrawn, and that all irregularities in the service of notice were cured by the general appearance of the attorney, citing as authority the case of *Morse v. Payne* (1 L. D., 144); that the testimony in the case shows

"that the requisite amount of breaking was done, a part by a prior entryman and a part by the defendant, and paid for by him"; that in the year 1882 there were between fifteen and twenty acres broken on said tract; that in the summer of 1882 the claimant left his entry papers with a land agent at Dawson for the purpose of selling his right to said land, and in the fall of that year left that part of the country, paying no further attention to his claim, nor disclosing his whereabouts to the agent with whom he left his entry papers, nor to any one else in the vicinity of the land; that there is no evidence that claimant procured or authorized any one to appear for him in this case or procure witnesses in his behalf; that it affirmatively appears that the witnesses were induced to attend by one J. E. Britton, and "no doubt he also employed said attorney"; that nearly all of the land broken was cultivated in 1883 and 1884 by different persons, but not through any arrangement or procurement by the defendant, directly or indirectly, nor did claimant have any knowledge that the land had been cultivated; that the allegations of the contestant were literally true; that because the parties who did such cultivation were trespassers, the claimant cannot claim the benefit of their acts, and therefore "said entry should be canceled."

The appellant insists that your office erred in finding (1) that the record showed a general appearance by defendant's counsel prior to said motion to dismiss the contest, and (2) that the charges alleged were proven.

It is quite evident from the record that the first contention of the appellant can not be maintained. Counsel entered his appearance in the local land office, without limitation, two days prior to the date when said testimony was to be taken. This was a general appearance, and if counsel was authorized to appear for the defendant, that would cure any irregularity in the service of notice. *Sage v. Railroad Company* (96 U. S., 712).

It is also true that when an attorney files his appearance in the case for the defendant, he will be presumed to be duly authorized to enter such appearance—unless there is a different rule prescribed—but this presumption is not conclusive, and the authority of the attorney may be inquired into, either at the request of the opposing party, or by the court or tribunal of its own motion. This does not conflict with the case of *Carduff v. Cormack* (*supra*), wherein it is stated that "It is contrary to custom and usage to compel a practitioner of good standing before the tribunals to produce his authority for appearing, and the more especially in those cases where no question is raised by either of the litigant parties regarding the authority, integrity, good faith, etc., of opposing counsel."

In the case of *Nelson F. Shelton v. Tiffin and Perry* (6 How., 183), the United States supreme court decided that "an appearance for a party not served, by counsel who has no authority to waive process and defend suit, does not bind that party; that the judgment or decree is a

nullity and that such want of authority may be proved by the attorney himself."

If then, as said decision of your office finds, said attorney had no authority to represent the claimant—it appearing that the notice by registered letter was not sent within the time required by the rules of practice—the judgment of your office must be considered erroneous. It follows, therefore, that the proceedings must be vacated and the contestant will be allowed to amend her contest affidavit, and upon the issue of an alias notice, in accordance with the rules of practice, another hearing should be had to determine the good faith and the rights of all parties in interest. *Sims v. Busse* (4 L. D., 369); *Hosek v. Glineicki* (ibid., 385). The decision appealed from is modified accordingly.

ADJUSTMENT OF RAILROAD GRANTS—ACT OF MARCH 3, 1887.

The *bona fide* purchasers of unclaimed lands, referred to in the third section of the act of March 3, 1887, are those who, without knowledge of wrong or error, have purchased from the railroad company lands previously entered by a pre-emption or homestead settler, whose entry has been erroneously canceled, and which land the settler did not elect to claim after the recovery of title under the proceedings prescribed by the second section of said act.

Until the land shall have been legally determined to belong to the United States, the right to issue patents under the fourth section of said act does not arise.

The right of purchase accorded in the fifth section of said act extends to indemnity lands as well as those within the primary or granted limits.

The only limitations to such right of purchase, are, (1) that said purchasers shall be citizens of the United States, or shall have declared their intention to become citizens; (2) that the land shall have been sold to them by a railroad company as a part of its grant; (3) that the land shall not have been conveyed to, or for the use of the company; (4) that the land shall be of the numbered sections prescribed in the grant, and coterminous with constructed parts of the road; and (5) that said purchasers shall have bought in good faith.

Attorney General Garland to the Secretary of the Interior, November 17, 1887.

By your letter of October —, 1887, you submit three questions for my opinion. They arise upon the construction of sections 3, 4, and 5 of the act of the 3rd of March, 1887, which, as shown by its title, as a whole was passed "to provide for the adjustment of land grants made by Congress, to aid in the construction of railroads, and for the forfeiture of unearned lands, and for other purposes" (24 Stat., 556).

The first section of the act directs the adjustment of the grants. The second section provides for the restoration of title to the United States, where lands have been erroneously certified or patented to the railroads. The third section is:

That, if in the adjustment of said grants, it shall appear that the homestead or pre-emption entry of any *bona fide* settler has been erroneously canceled on account of any railroad grant, or the withdrawal of public

lands from market, such settler, upon application, shall be reinstated in all his rights, and allowed to perfect his entry by complying with the public land laws; *provided*, that he has not located another claim, or made an entry in lieu of the one so erroneously canceled; *and provided* also, that he did not voluntarily abandon said original entry; and *provided* further that if any of said settlers do not renew their application to be reinstated within a reasonable time, to be fixed by the Secretary of the Interior, then all such unclaimed lands shall be disposed of under the public land laws, with priority of right given to *bona fide* purchasers of said unclaimed land, if any, and if there be no such purchasers then to *bona fide* settlers residing thereon.

The question submitted under this section is—

“What class of purchasers is referred to by the expression *bona fide* purchasers of said unclaimed lands?”

Three classes of persons are provided for under this section.

First. *Bona fide* settlers whose homestead or pre-emption entries have been erroneously canceled on account of a railroad grant or withdrawal.

Second. *Bona fide* purchasers of such unclaimed lands.

Third. *Bona fide* settlers residing thereon.

The rights of the several classes to the lands referred to in the section, are successive, in the order stated in the section. The first in right is the homestead or pre-emption settler, whose entry has been wrongfully canceled. If he elects to assert his right, and has not been disqualified by locating another claim, or making another entry in lieu of the entry erroneously canceled his right is absolute, and the successive rights of the remaining two classes can not attach if he lawfully asserts his claim. If he fail to claim the land, or is disqualified under the act, the second class of persons, who are the *bona fide* purchasers of the land unclaimed by him, attach, and have precedence over the third class. The *bona fide* purchasers here referred to are those who, without knowledge of wrong or error, have purchased from the railroad company lands which had been previously entered by a pre-emption or homestead settler, whose entry had been erroneously canceled, as described in the first clause of the third section, and which land the pre-emption or homestead settler did not elect to claim after the recovery by the proceedings prescribed by the second section of the act.

The second question submitted by you is:

“Can the Department, after adjustment of the grant by the Department, issue a patent to the purchaser of such land before the said land has been reconveyed by the road, or title recovered by judicial proceedings?”

This question, as shown by your letter, refers to patents whose issue is provided for in the fourth section of the act. The fourth section is a part of a general scheme for the disposition of lands which have been erroneously certified or patented to the railroads, which certification or patenting has been set aside, and the title restored to the United States as provided for in the second question. The language of the section: “That as to all lands which have been so erroneously

certified or patented as aforesaid" in the fourth section, refers to the same lands described in the second section as follows: "That if it shall appear that lands have been from any cause, heretofore erroneously certified or patented etc."

The second section declares that the mode to finally determine whether the lands shall have been so erroneously certified or patented, shall be by the admission of the company and a re-conveyance, or, in case of dispute, by judicial proceeding. Until the land shall have been legally determined to belong to the United States, the right to issue patents under the fourth section does not arise. If patents should issue under the fourth section before re-conveyance or judicial recovery under the second, and proceedings should then be instituted to cancel the patent issued to the railroad, in case of a decision adverse to the government in the proceeding instituted, two patents would be outstanding at the same time for the same land. By the express words of the section with reference to the time when the patent shall issue: "The person or persons so purchasing in good faith shall be entitled to the land so purchased after the grants respectively shall have been adjusted." As the adjustment then must be completed first the patents under the fourth section are only intended to be issued after it shall have been legally determined, in the mode prescribed in the second section, that the certification or patent to the railroad had been erroneously issued.

The third question is as follows:

Third. The fifth section of said act provides that where a railroad company has sold to citizens of the United States, or persons who have declared their intention to become such, lands not conveyed to or for the use of such company, the same being the numbered sections prescribed in its grant, and coterminous with the constructed part of its road, and where such lands are for any reason excepted from the operations of the grant to said company, it shall be lawful for the *bona fide* purchaser thereof from said company, to make payment to the United States for said land, at the ordinary government price for like lands and thereupon patents shall issue therefor to the said *bona fide* purchaser, or his heirs or assigns. The question submitted under this section is whether the proviso last above quoted is confined in its application to lands within the primary granted limits, or whether it applies to lands within the indemnity limits of which the company has made selection, but which has not been approved to it.

The first section of the act, in the use of the word "grant" must have necessarily included both the primary and indemnity limits in the adjustment, as it was doubtless intended that the adjustment should be a full and final one. The lands which, under the adjustment, were found not to be the property of the railroad, were intended to be free from the cloud of claim by the railroad, and restored to the public domain for disposition according to law. The intent of the act shows that to carry out its purposes the word "grant," wherever used in the

second, third, and fourth sections, must include the lands in both the primary and indemnity limits, as each directly, or by necessary implication, refers to the adjustment provided for in the first section. The protection afforded, and redress granted, the settler by each of the sections is fully as important in the indemnity as in the primary limits. The limitation on further certification or patenting contained in the seventh section is fully as important as, and of more practical value, when applied to the indemnity limits, than to the primary limits of the grant. The fifth section is a part of the same scheme as the residue of the act. The wrong done the settler who in good faith shall have purchased lands of the railroad company, to which the company by the adjustment is shown to have no legal right, is identical, whether the purchases are in the indemnity or primary limits. The hardship he may be subjected to by loss of his land, improvements, and labor is the same in either case. The whole scope of the law from the second to the sixth section, inclusive, is remedial. Its intent is to relieve from loss settlers and *bona fide* purchasers who, through the erroneous or wrongful disposition of the lands in the grants, by the officers of the government, or by the railroads, have lost their rights or acquired equities, which in justice should be recognized. That the selection sold by the railroad company shall have been approved, is not required by the fifth section, nor that it shall have been patented. That the land shall have been approved to the company, before the purchasers shall be entitled to the benefit of the sixth section, is not required. By the words of the act, the only requisite established, to entitle those wronged to its benefit, is, that they shall be citizens of the United States, or shall have declared their intention to become citizens; that it shall have been sold to them by a railroad company as a part of its grant; that the land shall not have been conveyed to or for the use of the company; that the lands shall be of the numbered sections prescribed in the grant, and coterminous with constructed parts of the road; and that the purchasers shall have bought in good faith. It was not intended to limit the redress to cases in which the railroad could rightfully have sold the lands. The whole remedial part of the law was passed with a recognition of the fact that the railroad companies had sold lands to which they had no just claim. The fifth section expressly refers to such lands as had been sold, which had not been conveyed "to or for the use of such companies." It is not required that the sale by the railroad companies shall have been made on its part in good faith, but only that the purchaser shall have bought in good faith. That it was sold under a claim of the grant to another in good faith is the ground of his equity. In order that the remedy may be adequate to redress the wrong, the word "grant," in the fifth section, must be construed to include, as it does in the preceding sections of the act, both primary and indemnity limits.

ADJUSTMENT OF RAILROAD GRANTS—ACT OF MARCH 3, 1887.

INSTRUCTIONS.

Secretary Lamar to Acting Commissioner Stockslager, November 22, 1887.

The act of March 3, 1887, authorizes and directs the Secretary of the Interior to immediately adjust in accordance with the decisions of the supreme court each of the railroad land grants made by Congress to aid in the construction of railroads, and heretofore unadjusted.

The second section of said act provides—

That if it shall appear, upon the completion of such adjustments respectfully (respectively), or sooner, that lands have been, from any cause, heretofore erroneously certified or patented, by the United States, to or for the use or benefit of any company claiming by, through, or under grant from the United States, to aid in the construction of a railroad, it shall be the duty of the Secretary of the Interior to thereupon demand from such company a relinquishment or reconveyance to the United States of all such lands, whether within granted or indemnity limits; and if such company shall neglect or fail to so reconvey such lands to the United States within ninety days after the aforesaid demand shall be made, it shall thereupon be the duty of the Attorney-General to commence and prosecute in the proper courts the necessary proceedings to cancel all patents, certification, or other evidence of title heretofore issued for such lands, and to restore the title thereof to the United States.

The provision contained in this section confers no greater power upon the Secretary of the Interior than he possessed before the passage of that act, and which from time to time has been exercised by that official in recommending to the Attorney General that suits be brought to cancel patents appearing to have been erroneously certified or patented for the benefit of any railroad company.

The purpose of the act was to make that mandatory which before rested in the discretion of the Secretary in the exercise of his authority over the public lands. Heretofore the Secretary of the Interior might recommend and request the Attorney General to institute suits for the cancellation of patents, which in his judgment were erroneously issued for the benefit of any railroad company under its grants, and the Attorney General in the exercise of his authority might grant or refuse such request as in his judgment might seem proper, but, under the act above referred to, whenever it shall appear upon the completion of the adjustment of any railroad land grant, or sooner, that any lands have been erroneously certified or patented for the benefit of said company, it is made the imperative duty of the Secretary of the Interior to demand of said company a relinquishment or reconveyance to the United States of all such lands, and if the company neglects or fails to reconvey the same, it shall thereupon be the duty of the Attorney-General to commence and prosecute in the proper courts necessary proceedings to can-

cel the patents for said lands, and to restore the title thereof to the United States.

Therefore, if in the adjustment of the grant of any road it should appear from the records in your office that any lands within either the granted or indemnity limits of such road have been erroneously certified or patented for the benefit of such company, either from an improper adjustment of the limits of said grant, or from the erroneous cancellation of any filing or entry, or from any cause whatever, you will report such facts to the Department for action thereon, stating fully and specifically the grounds upon which it is supposed such tracts were erroneously certified or patented, and whether said tracts are within the granted or indemnity limits of said road.

The third section of said act provides:

That if, in the adjustment of said grants, it shall appear that the homestead or pre-emption entry of any bona fide settler has been erroneously canceled on account of any railroad grant or the withdrawal of public lands from market, such settler upon application shall be reinstated in all his rights and allowed to perfect his entry by complying with the public land laws: *Provided*, That he has not located another claim or made an entry in lieu of the one so erroneously canceled: *And provided also*, That he did not voluntarily abandon said original entry: *And provided further*, That if any of said settlers do not renew their application to be reinstated within a reasonable time, to be fixed by the Secretary of the Interior, then all such unclaimed lands shall be disposed of under the public land laws, with priority of right given to bona fide purchasers of said unclaimed lands, if any, and if there be no such purchasers, then to bona fide settlers residing thereon.

This section does not embrace any lands that have been certified or patented to the company, but has reference solely to lands, the right and claim to which has heretofore been adjudicated in favor of the company as against the right of a settler upon said lands, and which are still under the control and jurisdiction of the Department. The object and purpose of this section is to correct all decisions made by the Department or the General Land Office where it shall appear in the examination of any land grant heretofore unadjusted that the homestead or pre-emption entry of a bona fide settler was erroneously canceled. In such case a final decision of a former or the present Secretary is not only no longer a bar to the further consideration of the question decided, but it is made the duty of the Secretary to readjudicate the case, notwithstanding the former decision, whenever it appears that the pre-emption or homestead entry of any bona fide settler has been erroneously canceled on account of any railroad grant or of withdrawal of public lands from market.

In the adjustment of every grant to aid in the construction of railroads, you will make report upon all pre-emption and homestead entries of bona fide settlers that may in your judgment appear from the records of your office to have been erroneously canceled, either because the land is within the limits of the railroad grant, or because it had been

withdrawn for indemnity purposes for said road, provided the right to the tract has been decided in favor of the company, and forward said report to the Department for consideration and action thereon, stating fully and specifically as to each particular tract, the grounds upon which you may determine that said pre-emption and homestead entries were erroneously canceled, and the right to the land erroneously decided in favor of the company; and upon filing said report you shall cause notice thereof to be given to both parties, advising them that said case will be held by this Department for thirty days before action, during which time they can make such showing as they may desire.

If in such report you should determine that the pre-emption or homestead entry of any bona fide settler has been erroneously canceled, and the right to the land adjudged in favor of the railroad, and your decision thereon shall be sustained by the Department, after due notice the land will then be subject to disposal as provided for in said section; that is, the settler whose entry was erroneously canceled will be notified of his right to make application to be re-instated in all his rights, and if such settler shall make such application within a reasonable time, to be fixed by the Secretary of the Interior in such notice, he shall be re-instated in all his rights: Provided that he shows affirmatively that he has not located another claim or made an entry in lieu of the one so erroneously canceled, and that he did not voluntarily abandon said original entry. If said settler should fail to make application within the time required, and to show that he has not located another claim or made an entry in lieu of the one so erroneously canceled, and that he did not voluntarily abandon said original entry, then all such unclaimed lands shall be disposed of under the public land laws, with priority of right given to bona fide purchasers of said unclaimed lands, if any, and if there be no such purchasers, then to bona fide settlers residing thereon.

The bona fide purchasers here referred to are those who, without knowledge of wrong or error, have purchased from the railroad company lands which had been previously entered by the pre-emption or homestead settler, whose entry has been erroneously canceled as described in the first clause of the third section, and which land the pre-emption or homestead settler did not elect to claim after recovery by the proceedings prescribed by the second section of the act.

As to the lands which have been erroneously certified or patented to the company (being the lands referred to in the second section), the fourth section of the act provides for the disposal of such of those lands as may have been sold by the company to citizens of the United States or persons who have declared their intention to become such citizens, upon the following conditions:

After said lands shall have been reconveyed to the government, or the title to the same recovered, the class of persons above referred to, so purchasing in good faith, their heirs or assigns, shall be entitled to the land so purchased, upon making proof of such purchase at the proper

land office, within such time and under such rules as may be prescribed by the Secretary of the Interior, after the grants respectively shall have been adjusted; and patent shall issue to such persons, which shall relate back to the original certification or patenting. The section then provides that the Secretary of the Interior shall demand of the company payment for said lands, of an amount equal to the government price of similar lands; and in case of the neglect or refusal of the company to make payment thereof within ninety days after demand, the Attorney-General shall cause suits to be brought against the company for said amount. Under the act the purchaser of such lands from the company may recover from the company the purchase-money paid by him, less the amount paid by the company to the United States.

A mortgage or pledge of said lands by the company is not a sale, within the meaning of the act.

The object of this section is to confirm to the purchaser the title to the land therein referred to, upon making proof of such purchase, and that the purchaser has the qualifications required by the act, without requiring of the purchaser any further payment to the government of the purchase price of said land.

The fifth section of said act reads as follows:

That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns: *Provided*, that all lands shall be excepted from the provisions of this section which at the date of such sales were in the bona fide occupation of adverse claimants under the pre-emption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries and to receive patents therefor: *Provided further*, that this section shall not apply to lands settled upon subsequent to the first day of December, 1882, by persons claiming to enter the same under the settlement laws of the United States, as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases.

Under this section, when the company has sold to citizens of the United States or persons who have declared their intention to become such citizens, the numbered sections prescribed in the grant, and coterminous with the constructed portions of the road, within either the granted or indemnity limits, and which upon the adjustment of the grant are shown to be excepted from the operation of the grant, it shall be lawful for such purchasers—if their purchase is bona fide—to purchase said land from the government by payment of the government price

for like lands, unless said lands were at the date of purchase in the bona fide occupation of adverse claimants under the pre-emption or homestead laws, in which case the pre-emptor or homestead claimant may be permitted to perfect his proof, unless he has since voluntarily abandoned the land.

Under the last proviso of said section, however, if a settlement was made on said lands subsequent to December 1, 1882, by persons claiming the same under the settlement laws of the United States, it will defeat the right of the purchaser whether said purchase was made prior to or subsequent to December 1, 1882, and the settler will be allowed to prove up for said lands as in other like cases.

The sixth section provides that when any such lands have been sold and conveyed as the property of the company, for State and county taxes, and the grant to the company has been thereafter forfeited, the purchasers at such sale shall have the preference right for one year from the date of the act in which to purchase said lands from the United States, by paying the government price for said lands, provided said lands were not, previous to or at the time of the taking effect of such grant, in the possession of or subject to the right of an actual settler.

The seventh section provides—

That no more lands shall be certified or conveyed to any State or to any corporation or individual, for the benefit of either of the companies herein mentioned, where it shall appear to the Secretary of the Interior that such transfers may create an excess over the quantity of lands to which such State, corporation or individual would be rightfully entitled.

You will proceed at once, and with as much dispatch as possible, to adjust all land grants to aid in the construction of railroads, under the provisions of the act above referred to, and in accordance with the directions herein given. You will inform the Department at once when you commence the adjustment of any grant, in order that cases pending in the Department involving the rights of the road under such grant may be taken up and considered.

TIMBER CULTURE ENTRIES.

CIRCULAR.*

Commissioner Sparks to registers and receivers, June 27, 1887.

The following regulations under the timber-culture laws are prescribed:

1. The only persons who are authorized to make timber-culture entries under the act of June 14, 1878, are heads of families or single persons who have attained the age of twenty-one years, and are citizens of the United States or have declared their intention to become such, and who have made no previous entry under the timber-culture laws.

* For previous circulars see 1 L. D., 638, 651, 652; 2 *id.*, 660.

2. Entries are restricted to one quarter section or one hundred and sixty acres, which may be portions of contiguous sub-divisions of the section, provided the entry forms a compact body of land.

3. No person can make more than one entry. Timber-culture rights once exhausted cannot be restored by the Commissioner of the General Land Office.

4. No more than one quarter of any section can be embraced in one entry, and the entire section must be exclusively prairie lands or other lands devoid of timber. The removal of a natural growth of timber will not render land subject to timber-culture entry.

5. A person applying to make a timber-culture entry must file the affidavit prescribed by law, showing his qualifications to make the entry; that the section of land specified in his application is composed exclusively of prairie or other lands devoid of timber; that the entry is made for the cultivation of timber and for his own exclusive use and benefit; that he makes his application in good faith, and not for the purpose of speculation, nor directly or indirectly for the use or benefit of any other person or persons whomsoever; that he intends to hold and cultivate the land and to fully comply with the provisions of the law, and that he has not heretofore made an entry under said timber-culture act or any acts of which said act of 1878 is amendatory.

The following form of affidavit is prescribed:

TIMBER-CULTURE AFFIDAVIT.

Land Office at _____,
(Date) _____, 18____.

I, _____, of (town or city) _____, county of _____, State (or Territory) of _____, having filed my application No. _____ for an entry under the provisions of an act entitled "An act to amend an act entitled 'An act to encourage the growth of timber on the western prairies,'" approved June 14, 1878, do solemnly _____ that I am the head of a family (or over twenty-one years of age), and a citizen of the United States (or have declared my intention to become such); that I have made personal examination of said land and from my personal knowledge of the same state that the section of land specified in my said application is composed exclusively of prairie lands, or other lands devoid of timber; that this filing and entry is made for the cultivation of timber, and for my own exclusive use and benefit; that I have made the said application in good faith and not for the purpose of speculation, or directly or indirectly for the use or benefit of any other person or persons whomsoever; that I intend to hold and cultivate the land, and to fully comply with the provisions of this said act; and that I have not heretofore made an entry under this act, or the acts of which this is amendatory.

My post-office address is _____

I hereby certify that the foregoing affidavit was read to affiant in my presence before he signed his name thereto; that said affiant is to me personally known (or has been satisfactorily identified before me by _____), and that I verily believe him to be a credible person and the person he represents himself to be, and that this affidavit was subscribed to before me at my office in _____ on this _____ day of _____, 18____.

Any person falsely swearing to this affidavit, or to any affidavit required by law or regulations under the timber-culture act, is guilty of perjury, and will be punished as the law provides for such offense.

6. The foregoing affidavit, and the non-mineral affidavit, can be made only upon the personal knowledge of affiant, and neither of said affidavits can be made by any other person than the applicant himself.

7. Non-mineral affidavits will be required in all timber-culture entries in districts in which non-mineral affidavits are required in other cases of agricultural entry, and must in every instance accompany the original entry application, and must be made at the same time and place and before the same officer as the original timber-culture affidavit.

8. All affidavits required under the timber-culture laws must be made before the register or the receiver or the clerk of some court of record, or officer authorized to administer oaths in the district where the land is situated. Timber-culture affidavits executed or signed outside of the district in which the land is situated, or executed or signed in blank, are illegal. Every affiant must be sworn personally by the officer taking the affidavit, at his office, and at the date specified in the jurat; and the officer taking the affidavit must certify that the person was so sworn and that the same was read in full to affiant before he affixed his signature thereto; and the attesting officer must certify to the identity and credibility of the party appearing before him.

9. Timber-culture entries cannot be made for mineral lands, nor for lands within the limits of town sites, or covered by municipal improvements.

10. Before allowing any entry applied for, the register and receiver will, by a careful examination of the tract and plat books, satisfy themselves that the entry applied for will not conflict with any other entry or entries previously made. They will require the party to pay the fee and that part of the commission payable at the date of entry, for which the receiver will issue his receipt in duplicate (Form 4-142), giving the duplicate receipt to the party.

11. The payments required by law on a timber-culture entry are as follows: For eighty acres or less, fee \$5, to be paid at date of entry; commissions \$4; total \$9. For more than eighty acres, fee \$10 at date of entry; commissions \$4; total \$14. Besides, in each case, \$4 when final proof is made. No other fee, charge, gratuity, or reward is permitted to be paid or received for any services rendered at district land offices in connection with such entries. The receiver will account for the fees and commissions in the usual manner, indicating the same as fees and commissions on timber-culture entries. No distinction is made, as to area or the amount of fee and commissions, between minimum and double minimum lands. The register and receiver will number the entry in its order and proper series of numbers and will note the entry on their records and report the same in their monthly returns, sending up all the papers therein, with an abstract of the entries allowed during the month.

12. Five acres on a quarter-section must be broken or plowed the first year, and five acres the second year. The second year the first five acres must be cultivated to crop or otherwise. The third year the second five acres must be cultivated to crop or otherwise, and the first five acres must be planted in timber, seeds, or cuttings. The fourth year the second five acres must be planted in timber, seeds, or cuttings. Ten acres are thus to be plowed, planted, and cultivated on a quarter-section, and the same proportion when less than a quarter-section is

entered. The whole ten acres or the due proportion thereof must be prepared and planted within four years from the date of the entry, five acres being prepared the first and second years and planted the third year, and five acres being prepared the second and third years and planted the fourth year.

13. The preparation of the ground by breaking and cultivation to crops must be thorough. The plowing must be done at the proper season of the year and must be sufficiently deep to thoroughly break and mix the soil, and the cultivation to crop must be actual and *bona fide*. The object of the law is to promote the cultivation of timber, and land not made fit, by careful and thorough preparation, to produce a growth of trees, is not prepared as contemplated by law, and a failure to strictly comply with the law renders the entry liable to contest.

14. Trees, tree seeds, or cuttings must be of suitable character to germinate and grow with proper cultivation, and must be carefully and properly set out or planted, and at a proper season of the year to ensure growth, and must be carefully and thoroughly cultivated.

15. Where land is selected for timber-culture entry which in its natural state will not produce trees without irrigation, the ground will not be regarded as properly prepared nor the trees as properly cultivated unless the land is irrigated and the trees kept watered.

16. Where the ground is properly prepared and cultivated, and the planting of suitable trees, seeds, or cuttings is well and seasonably done, and the same should not germinate and grow, the ground must be replanted and vacancies filled the same or next succeeding season. If the trees, seeds, or cuttings are destroyed by grasshoppers or by extreme and unusual droughts, the time of planting may be extended one year for every year of such destruction, upon the filing in the local office of an affidavit by the entry-man, corroborated by two witnesses, setting forth the destruction and asking the extension of time provided for by the act.

17. The offering of relinquishments for sale after entry will be regarded and treated as evidence tending to prove the fraudulent or speculative character of the entry.

18. The following classes of trees are recognized as "timber" within the meaning of the law, viz: Ash (including mountain ash, or service-tree), alder, basswood, beech, birch, box-elder, black-walnut, butternut (otherwise called white-walnut), cedar, chestnut, cottonwood, elm, fir, hickory, honey-locust, larch, maple, oak, pine, spruce, sycamore (otherwise called buttonwood, or cotton-tree), white willow, whitewood (or tulip-tree); and other trees recognized in the neighborhood as of value for timber, for firewood or domestic use or for commercial purposes. Fruit trees, hedges, and shrubbery cannot be classed as "timber," and their cultivation is not sufficient to satisfy the demands of the law.

19. Final proof can be made at the expiration of eight years from date of entry, or at any time within five years thereafter. In making final proof it must be shown:

First. That not less than twenty-seven hundred (2,700) trees of the proper character were planted on each acre required to be planted.

Second. That the quantity and character of trees as aforesaid have been cultivated and protected for not less than eight years preceding the time of making proof.

Third. That at the time of making proof there are growing at least six hundred and seventy-five (675) living and thrifty trees to each acre.

20. Perfect good faith must be shown by claimants. If trees, seeds, or cuttings are destroyed they must be replanted; and not only must

trees be planted, but they must be protected and cultivated in such manner as to promote their growth.

21. All entries since June 14, 1878, are made under the act of that date. Parties who made entries under any of the former acts may complete the same and make final proof under the act of 1878, upon showing that they have had under cultivation, for at least eight years the number of acres required by the act of 1878, and at the time of presenting final proof have the number of living and thrifty trees required thereby; but they need not show that they followed the manner of planting prescribed by the later act, if the planting was done in accordance with the requirements of any one of the preceding acts.

22. In computing the period of cultivation the time runs from the date when the total number of trees, seeds, or cuttings required by the act are planted.

23. Hereafter parties desiring to offer final proof in timber-culture cases will be required to file a notice of their intention with the register of the proper district land office, and the same shall be published in the same manner as in homestead and pre-emption cases.

24. In making final proof the claimant (or, if he be dead, his heirs or legal representatives) must appear in person with at least two witnesses at the land office of the district in which the land is situated, and there make the necessary proofs; or the affidavit of the party may be made, and his testimony, and the testimony of his witnesses, given before a judge or clerk of a court of record in such land district, but all the proof must be taken at the same time and place and before the same officer.

25. The officer administering the oath or taking the testimony must certify to the identity and credibility of the party appearing before him.

26. The proof must set forth specifically and in detail all the facts of the case, showing when cultivation was commenced, the acts performed, amount of land plowed, cultivated and planted, what was done in each year, the total number of trees planted, the total number growing, and their size and condition at date of proof, and any other facts or circumstances material to the case. (Forms 4-093, 4-385, and 4-386).

27. The register and receiver will carefully examine the evidence, and, if found sufficient to show that the claimant has fully complied with the law, they will proceed (on payment of the final commissions allowed by law) to issue the final certificate and receipt in the manner prescribed in forms 4-148 and 4-217.

28. Contests may be instituted against timber culture entries for illegality or fraud in the inception of the entry, for failure to comply with the law after entry, or for any sufficient cause affecting the legality or validity of the claim. (See rule 1, *et. seq.* of practice, approved August 13, 1885).

29. Contestants of timber-culture entries since the adoption of the foregoing rules of practice are not required to file an application to enter the land at the time of the initiation of contest, but the successful contestant secures a preference right of entry under the second section of the act of May 14, 1880—21 Stat., 140. (This regulation overrules the decision in *Bundy v. Livingston*, 1 L. D. 152).

30. No land acquired under the provisions of the act of June 14, 1878, will in any event become liable to the satisfaction of any debt or debts contracted prior to the issuing of the final certificate therefor.

31. Applicants to make timber-culture entries, and claimants and witnesses making final proof, must in all cases state their place of actual

residence, their business or occupation, and their post-office address. It is not sufficient to name the county and State or Territory where a party lives, but the town or city must be named, and if residence is in a city the street or number must be given.

32. Nothing herein will be construed to have a retroactive effect in cases where the official regulations of this Department in force at the date of entry were complied with.

Approved July 12, 1887.

L. Q. C. LAMAR,
Secretary.

HEARING—EVIDENCE; PRE-EMPTION.

ETIENNE MARTEL.

In case of a hearing, after final proof, on the report of a special agent, the decision should rest upon the evidence adduced at the trial, to the exclusion of the final proof and the report of the agent.

Good faith in settlement is the fundamental principle upon which rests the right of pre-emption; and the rescission of an agreement to convey, would not impart validity and honesty of purpose to acts, that, when performed, were absolutely invalid on account of their fraudulent character.

Acting Secretary Muldrow to Commissioner Sparks, August 25, 1887.

I have considered the case presented by the appeal of Etienne Martel from your office decision of July 29, 1885, holding for cancellation, for fraud, his commutation homestead entry, for the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, and lot 1, Sec. 31, and Lots 5 and 6, Sec. 30, T. 60, R. 25, St. Cloud district, Minnesota.

Etienne Martel is one of three men—the other two being Michael Philibert and Louis Dufour—who made homestead entry at the same time (May 22, 1883,) and who on making commutation proof (April 8, 1884,) were witnesses for each other.

Special Agent Webster Eaton reported the entries fraudulent, whereupon a hearing was ordered, and had July 7, 1885. The defendant, who had been duly notified, was not present in person, but was represented by counsel, R. L. Wilkins, who objected to the proceedings, on the ground that—"This case has passed out of the jurisdiction of the land office. They"—referring to Martel, Philibert, and Dufour, whose cases were investigated at the same hearing—"offered their final proof according to law, final proof was accepted, the money paid, and certificate issued; and the land now belongs to the purchasers." The local officers overruled this objection, and the hearing proceeded.

The only testimony taken on the part of the government was that of S. B. Wentworth, who testified that he was one of the firm of Wentworth & McGuire, who in the years 1882 and 1883 was engaged in the business of hiring men to take pre-emption and homestead claims upon pine lands for the benefit of said firm. He added:

Etienne Martel made a homestead for us in 1883; he was put on there by us; William Fawcett located the defendant. . . . McGuire

and Fawcett and I were in partnership. We located about twenty or twenty-one men. We kept a set of books; we had not paid any money yet, but had furnished supplies; we quit the business before we paid him any money. I think we canceled the agreement with him; we told him to do as he chose about it—we could not furnish him any more and had no further claim upon him. The arrangement with this man was to pay him thirty dollars a month, and his provisions, and \$250 when he proved up. We gave up the business of getting men to take claims for us on the 2d day of October, 1883.

The reason why the firm of which this witness was a member gave up the business of hiring men to pre-empt and homestead lands for them was, that the special agent of your office had detected the frauds that were being perpetrated, and reported to your office over a score of them—the case now under consideration being one.

The defense produced no witnesses, but rested its case—depending (as appears from brief of counsel) upon the testimony taken upon final proof to overbalance that of the single witness for the government taken at the hearing.

The local officers merely transmit the testimony of your office, without summing it up, adding in conclusion the finding—"From the testimony submitted we see no reason why said entry should be canceled."

On the transmittal of the record to your office, you reversed the decision of the local officers, and held the entry for cancellation. Whereupon claimant appealed to the Department, alleging a long array of errors, substantially to the effect that your office decided against the weight of evidence adduced before the local officers when claimants offered final proof; that your decision was "instigated" by the special agent, and a reversal of the decision of the local officers secured "through his secret manipulation"; that Wentworth's evidence at the hearing ought not to be considered because "it was secondary and hearsay, and but a repetition of that previously adduced" (in the affidavit forwarded to your office with the special agent's report); that the fact that Fawcett and McGuire were not introduced as witnesses for the prosecution aroused a presumption that their testimony would not have sustained that of Wentworth; that no *written* contract between Wentworth and defendant is proven, and no other would be valid; that if a contract were proven by competent evidence, it was rescinded October 2, 1883, before the making of final proof, and therefore "was no impediment to claimant's making final proof and entry of the land."

To all of which it may be said that your office, very properly, based its decision upon the facts disclosed *at the hearing*—irrespective of the testimony submitted on making final proof on the one hand (James Copeland, 4 L. D., 275), and of the special agent's report and the accompanying affidavit on the other (George T. Burns, 4 L. D., 62); that if, as counsel alleges, the testimony of Martel, Dufour, Philibert, Fillmore, McGuire, and Fawcett would have contradicted that of Wentworth, it was a fatal oversight on his part to fail to place them on the witness

stand ; that the testimony of Wentworth, being direct, specific, circumstantial, and uncontradicted by any other witness sworn *at the hearing* must be accepted as true ; and finally, that "*bona fides* in settlement is the fundamental principle upon which the right of pre-emption is founded and it can not be held that the rescission" of an agreement to convey "gave validity and imparted good faith and honesty of purpose to acts that, when performed, were absolutely invalid on account of their fraudulent character" (*La Bolt v. Robinson*, 3 L. D., 488).

Your decision holding Etienne Martel's entry for cancellation is affirmed, for the reasons herein stated.

PRE-EMPTION—QUALIFICATION OF SETTLER.

MEILKE *v.* O'BRIEN.

A pre-emptor who has not, within a year prior to filing, made his home on other land belonging to him in the same State, is not within the prohibition of the second clause of section 2260 R. S.

Acting Secretary Muldrow to Commissioner Sparks, October 25, 1887.

I have considered the case of William Meilke *v.* Owen O'Brien, on appeal by O'Brien from your office decision of December 19, 1885, holding for cancellation his pre-emption cash entry No. 8701, for the NE. $\frac{1}{4}$ of Sec. 10, T. 103 N., R. 54 W., Mitchell, Dakota land district.

O'Brien filed declaratory statement March 7, 1882, alleging settlement March 1st, and on December 2, 1882, submitted final proof which was approved by the register and receiver and final certificate issued thereon. On September 22, 1883, Meilke filed affidavit of contest against said entry, alleging that the claimant had abandoned land of his own to settle upon the tract in question. A hearing was ordered and was held before the local officers January 25, 1884. The local officers decide "the affidavit of contest is not sustained and the same should be dismissed. Meilke appealed to your office and on December 19, 1884, you decided in favor of contestant and held the entry for cancellation. From this decision O'Brien appealed.

There is no contradiction between the parties as to the facts in the case which are as shown by the testimony substantially as follow. O'Brien made homestead entry April 8, 1880 for the SE. $\frac{1}{4}$ of Sec. 15, T. 103 N., R. 54 W., and on June 1, 1881, acquired title thereto by purchase under the act of June 15, 1880. About the last of June, 1881, he went to Minnesota with the intention of remaining there. He made his home in Minnesota until the spring of 1882, when he returned to Dakota and on March 7th filed his declaratory statement for the land in controversy. On June 1, 1881, there was no habitable house on his homestead land, and he had not resided there for some time previous

to that date. At the date of the hearing he was residing on his homestead land and had resided there since May 6, 1883. In your decision it is said: "It further appears that on December 12, 1882, O'Brien sold this tract to one Joseph Schneider for \$525.00", but I find nothing in the testimony showing that fact. The only foundation for this finding is the naked statement made in contestant's brief and argument filed in your office on appeal that such was a fact. Even if this were true it would not necessarily invalidate the entry, since he had a right to dispose of the land after the issuance of final certificate, provided the requirements of law had been complied with prior thereto.

After a careful consideration of the case I find that O'Brien had not made his home on other land belonging to him in Dakota for about a year prior to filing on the land in controversy, and therefore he did not come within the prohibition of the second clause of section 2260, Revised Statutes.

The final proof shows that the claimant made settlement March 1, 1882, building a frame house ten by twelve feet and frame barn, and at date of final proof had five acres broken, all valued at \$75.00. The proof further shows that claimant's residence from March 1, to December 2, 1882, the date of making final proof was continuous. These proofs were approved by the local officers, final certificate issued and payment received for the land. I think the claimant has complied with the requirements of the law and patent should issue to him. Your said office decision is therefore reversed.

COMMUTATION ENTRY; SPECULATIVE CONTEST.

COTTON *v.* STRUTHERS.

The commutation of a homestead entry is only the consummation of the homestead right, and is not an exercise of the pre-emption privilege.

The preference right of entry, accorded a successful contestant, cannot be secured through a speculative contest.

Acting Secretary Muldrow to Commissioner Sparks, October 25, 1887.

I have before me the appeal of Eber Cotton from your decision of November 28, 1885, refusing to recognize his preference right of entry as against Struther's pre-emption filing, and holding for cancellation his (Cotton's) declaratory statement No. 22,317, for the NE. $\frac{1}{4}$ of Sec. 2, T. 103, R. 71, Mitchell district, Dakota.

The tract in question was originally covered by F. M. Williams's homestead entry, No. 16,300, of August 12, 1881. On August 3, 1882, Cotton initiated a contest, under which said entry (16,300) was canceled by your office by letter dated September 14, 1883. This cancellation seems to have been noted in the local office on September 27, 1883; and the facts appearing upon the subject would seem to indicate (especially

in view of the general presumption that the business of a public office has been done properly and in due course) that a first notice of such cancellation was mailed to Cotton, at his last reported address, on or about said 27th day of September, 1883. On October 10, 1883, a second notice of the cancellation was mailed to said contestant, addressed to the post office nearest to the land; apparently, in pursuance of the practice said to have prevailed in the office, to do this on the return of a first notice as unclaimed; this second notice was itself returned as unclaimed, and was then kept in the office until November 23, 1883, on which day Cotton called and was handed such returned notice of October 10. On October 23, 1883, R. B. Struthers filed declaratory statement No. 21,967 for the tract in question, alleging settlement October 22. On December 11, 1883 Cotton made a pre-emption filing for said tract, alleging settlement December 10, 1883.

On May 15, 1884, Struthers made final proof, Cotton filing a protest. On July 29, 1884, Cotton offered his proof, to which Struthers filed objections.

A hearing was duly had, and the local officers rendered a decision recommending the acceptance of Struthers's proof. From this decision Cotton appealed, but your office held his filing for cancellation upon the following grounds, viz: 1. "That Cotton was not a qualified pre-emptor at the date he made his filing, (he) having previously exhausted his pre-emptive rights by commuting (a) homestead entry" theretofore made by him. 2. "That he was disqualified by removing from land of his own in the same territory." 3. "That he (had) acted in bad faith."

As to the first of these grounds, the decision of this Department in the case of James Brittin (4 L. D., 441) shows that your holding was erroneous; it being settled that the commutation of a homestead claim is only the consummation of the homestead right, and not an exercise of the pre-emptive one.

The second ground for your decision was that what purported to be a sale by Cotton of other land of his in the territory, just two days before his filing, and to a grantee who was his brother-in-law and who in his turn conveyed to Cotton's father, was really only a *pretended* sale, made solely to enable Cotton to qualify as a pre-emptor in the territory. While I am inclined to concur in the opinion that the circumstances of the case do at least raise a serious doubt as to the genuineness of the sale in question, I do not think it necessary to decide the question, it being my opinion that upon other grounds Cotton's alleged preference right of entry must be denied.

For, I concur in your opinion that the contest in virtue of which Cotton claims a preference right of entry, was sufficiently shown to have been a speculative one. Not only was Cotton proved to have had several contests pending at the same time, and to have "sold" some and dropped others under circumstances throwing suspicion on his *bona fides*; but, furthermore, my conclusion upon the testimony is that he in

fact tried to sell the particular contest here in question, and that his whole conduct respecting it was such as to indicate that in this, as in other cases, he was simply a speculative dealer in rights which the law gives for a very different purpose.

Your decision is therefore affirmed.

SOLDIERS' ADDITIONAL HOMESTEAD—SECOND ENTRY.

HARLAN COLE.

In the matter of allowing second homestead entries the same principles should be followed that are recognized as governing the allowance of second pre-emption filings.

The right to make soldiers' additional entry is not exhausted by a location which through no fault of the locater proved invalid.

Acting Secretary Muldrow to Commissioner Sparks, October 27, 1887.

I have considered the appeal of Harlan Cole from your office decision, dated June 9, 1886, refusing to recertify his right to make soldier's additional homestead entry.

The facts in the case are as follows :

November 20, 1887, your office certified the right of Harlan Cole to make a soldier's additional homestead entry of not exceeding eighty acres. July 5, 1879, he by virtue of the certificate referred to made such entry No. 4532, for the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 10, T. 127 N., R. 30 W., St. Cloud, Minnesota.

September 15, 1879, one M. L. Roach filed his pre-emption declaratory statement embracing the same land, and alleged settlement June 20, 1879.

From this conflict of claims a contest resulted on which a hearing was had, and the matter finally coming before the Department on appeal, it was decided under date of April 27, 1882, that the claim of Roach under the pre-emption law was valid, and that his right to the land described was superior to that of Cole.

In May 1882, Roach transmuted his pre-emption filing to a homestead entry, upon which he made final proof and received final certificate January 27, 1885. Thereupon your office by its decision of June 9, 1886, canceled Cole's additional homestead entry, and further held that by reason of his entry made as above described, his rights under the homestead law were exhausted, and the right to make another additional homestead entry in lieu of his entry canceled as above stated could not be certified.

From this holding Cole appeals and assigns the following specifications of error :

(1) In holding that Cole had enjoyed his homestead right and exhausted the same by making the entry described.

(2) In refusing to return to him the additional homestead certificate used by him in making said entry.

(3) In refusing to recertify his right to make an additional homestead entry under the soldier's additional homestead law.

(4) In denying his right to make such entry in any manner after the cancellation of said entry No. 4532.

The record clearly establishes the fact that appellant was entitled to make a soldier's additional homestead entry.

The sole question then is—did he exhaust that right by making the entry which was canceled as has been described?

At the time he made his entry the land was, so far as the records of the local land office show, public land subject to settlement and entry. Subsequently, however, a filing was put of record by another, with allegation of settlement at a date prior to appellant's entry. Upon contest it was decided that the filing was valid. This amounted to deciding that Cole's entry was without any force or vitality so long as the pre-emptor continued to comply with the law. It appears from the record that the pre-emptor did continue to comply with the law, and that he has made final proof and received final certificate. Cole has therefore been precluded from acquiring title, or any valid right or claim which could ripen into title to the land. His entry as made never had any vitality, and in law was as if it had never been made. It could get life only through the failure of the pre-emption claim. But the pre-emption claim did not fail.

When the right of additional homestead was certified to Cole, the law contemplated that it should be enjoyed to the extent of the acquirement of title to a tract of public land not exceeding in area the amount specified in the certificate, unless by some act of the entryman he should through laches or failure to comply with the law forfeit that right.

In the case of *Hannah M. Brown*, decided by this Department July 2, 1885 (4 L. D., 9), it was held that a second filing should be allowed when the first proved invalid through no fault of the pre-emptor. In that case it was said:

When the law restricted persons, otherwise properly qualified, to "one pre-emption right" it meant a right to be enjoyed in its full fruition; not that a fruitless effort to obtain it should be equivalent to its entire consummation. So when the law declares that a party having filed a declaration of intention to claim such right as to one tract of land should not file a second declaration as to another, it meant the filing on a tract open to such filing and whereon the pre-emption right thereby claimed could ripen into an entry.

The same doctrine was again announced in the case of *Goist v. Bottom* (5 L. D., 643.)

Though the question in those cases was as to the right to make a second pre-emption filing, the principle applies with equal force to this case where under similar circumstances the right to make a second homestead entry is involved.

Cole could not consummate his entry made under his soldier's additional certificate, and this through no fault of his, but because another

claim to the land has been adjudged superior to his, which claim has been consummated and has ripened into a cash entry.

I am therefore of the opinion that he has not exhausted his homestead right, and that by virtue of his soldier's additional certificate he is entitled to make another entry in lieu of that which failed as herein set forth.

The decision appealed from is accordingly reversed.

RAILROAD GRANT—TERRITORIAL LIMITATION.

NORTHERN PAC. R. R. CO. v. UNITED STATES.

There is nothing in the terms of the act which limits the grant to the Oregon Central R. R. Co. to lands within the State of Oregon.

Acting Secretary Muldrow to Commissioner Sparks, October 29, 1887.

I have considered the case of the Northern Pacific Railroad Company v. the United States as presented by the appeal of the company from your decision, dated November 9, 1885, rejecting its list of certain lands in Washington Territory.

The facts in the case are sufficiently stated in the decision appealed from, that said lands do not inure to the Northern Pacific Railroad Company under its grant, and your conclusion is concurred in.

The only material point presented by the appeal is that the Oregon Central Railroad Company never had a grant of lands in Washington Territory. This point is considered to be not well taken. The grant to said last named company was not restricted to the State of Oregon, but was of—

Each alternate section of public lands, not mineral, excepting coal or iron lands, designated by odd numbers nearest to said road, to the amount of ten such alternate sections per mile, on each side thereof, not otherwise disposed of, or reserved, or held by valid pre-emption or homestead right at the time of the passage of this act. (16 Stat., 94.)

There is nothing in this section or in any other section of the act, limiting the grant to lands in the State of Oregon.

Your decision is affirmed.

RAILROAD GRANT—INDEMNITY UNDER THE ACT OF JUNE 22, 1874.

HASTINGS AND DAKOTA RY. CO.

Settlement having been made after the withdrawal for the benefit of the company, and filing allowed subsequently to the time at which the right of the road attached, the company is entitled to indemnity on relinquishment under the act of June 22, 1874.

Acting Secretary Muldrow to Commissioner Sparks, October 29, 1887.

I have before me the appeal of the Hastings and Dakota Railway Company from the decision of your office dated March 19, 1884, reject-

ing its application to relinquish the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 5, T. 114 N., R. 37 W., Redwood Falls, Minnesota, in favor of O. B. Dallon, under the act of June 22, 1874 (18 Stat., 194).

The tract in question is within the ten-mile (granted) limits of the grant in aid of the company above named, under the act of July 4, 1866 (14 Stat., 87). The withdrawal on the map of general route as provided by the fifth section of said act, became effective in the district in which the land is situated July 23, 1866; and the map of definite location was accepted by the Secretary of the Interior June 26, 1867.

The records show that Ole B. Dallon filed declaratory statement No. 19,030 for this tract August 7th, alleging settlement June 18, 1867. He paid for this tract with Louisiana Agricultural College Scrip 445, St. Peter R. & R., No. 257, June 9, 1871, and patent issued to him therefor July 20, 1872.

April 7, 1883, the railway company filed in the local office its relinquishment of this tract under said act of June 22, 1874. Your office, however, refused to accept said relinquishment, holding that the claim of Dallon was superior to that of the company, and that, as the company never had any claim to the land involved, it had no right to select indemnity therefor under said act.

The company in its appeal herein alleges two grounds of error, to wit:

"First, in holding said tracts excepted from said grant; Second, in denying the right of the company to select other land in lieu thereof under said act of June 22, 1874."

The act provides:

That if any of the lands granted be found in the possession of an actual settler whose entry or filing has been allowed under the pre-emption or homestead laws of the United States subsequently to the time at which, by the decision of the Land Office, the right of the road was declared to have attached to such lands, the grantees, upon a proper relinquishment of the lands so entered, or filed for, shall be entitled to select an equal quantity of other lands in lieu thereof," etc.

Now the right of the road is held to have attached to its granted lands June 26, 1867, when its map of definite location was accepted by the Secretary of the Interior. This filing of Dallon was allowed subsequently to June 26, 1867, or in the words of the act, subsequently to the time at which the right of the road attached to its granted lands. Furthermore the settlement of Dallon was made upon the lands which had been withdrawn from entry under the provisions by the fifth section of the granting act, and such settlement was therefore illegal. It was for such cases as this that the act of 1874 was passed.

It follows therefore, that the claim of the company for indemnity for this land must be allowed. In support of the view herein taken see *South & North Alabama R. R. Co.* (2 L. D. 484); and the same on review (3 L. D., 274).

The decision of your office is reversed.

PRACTICE—CONFLICTING HOMESTEAD CLAIMS.

SMITH *v.* KNOWLES.

A homesteader having set up his own settlement and residence to defeat the entry of another must submit to an order of cancellation if the evidence shows that he has failed to comply with the homestead law.

Acting Secretary Muldrow to Commissioner Sparks, October 29, 1887.

The questions involved in the rival homestead claims of James S. Smith and Charles D. Knowles to the NE. $\frac{1}{4}$ of Sec. 17, T. 104 N., R. 66 W., Mitchell, Dakota, land district, appealed by each of the parties from the decision of your office, dated December 31, 1885, have been considered by the Department.

The facts touching the matter in controversy are as follows :

On June 17, 1882, Knowles filed a soldier's declaratory statement on the land in controversy. On October 9th following, Smith made homestead entry, and on December 2 following, Knowles also made homestead entry, on said tract. August 17, 1883, Smith instituted a contest against Knowles's entry, alleging in his affidavit that Knowles failed to make any improvement, or to establish residence, on said land prior to May 29, 1883, and that he (Smith) was the only occupant of the same prior to that date; and that immediately after October 9, 1882, he established his residence on said land and has resided there continuously since. Whereupon a hearing was set by the local office for October 27, 1883. In the meantime, to wit, on September 17, 1883, the Commissioner of the General Land Office suspended Smith's entry, for conflict with that of Knowles, of which suspension Smith received notice October 1, 1883. On October 20, Smith, by letter, requested the Commissioner to withhold final action in the matter, till the testimony to be taken and the decision of the local officers were forwarded to him, and informing him that Knowles made no improvement till May 30, 1883, and that he (Smith) plowed two and a half acres of said tract in November, 1882, and that on March 20, 1883, he built a house and established his residence thereon. On the day of hearing, above stated, Smith offered to amend his affidavit of contest, by adding to it the allegation "that the said Charles D. Knowles did not within six months since filing said soldier's declaratory statement commence his settlement, residence and improvements upon said tract as required by sections 2304 and 2309 of the revised statutes of the United States." It would seem from Smith's appeal taken from the action of the register and receiver dismissing his contest that this proposed amendment was not permitted, and that said contest was dismissed on account of the insufficiency of the original affidavit. Be this as it may, the contest was dismissed on the ground of some defect, or supposed defect, of the affidavit on

which it was founded, and an appeal was taken by Smith to the Commissioner, November 26, 1883. On February 19, 1885, your predecessor, Commissioner McFarland, ordered a hearing to be had in the case, and after referring to Knowles's declaratory statement, and the two subsequent entries made as above stated, directed the register and receiver "to notify both parties and set a day for the hearing, at which each may appear and submit any evidence he may have to offer in support of his claim." The register and receiver in their decision, May 29, 1885, say: "May 8, 1885, a hearing was had to determine the respective rights of the parties, pursuant to Commissioner's letter "C" of February 19, 1885. Both parties appeared, and submitted testimony."

The local office decided that Knowles's entry should remain intact, and that Smith's should be canceled. Smith appealed, and on appeal your office decided that neither party had shown the residence required by law, and that both entries should be canceled, and the land in controversy left open to entry by the first legal applicant.

Smith insists that on the proceedings as above set out it was error to hold his entry for cancellation; that the hearing had was the result of a contest instituted by him against Knowles's entry, and that if said entry is canceled, he has a preference right of entry for thirty days after receiving notice of such cancellation; and that his failure to make settlement and comply with the homestead laws was not in issue at said hearing. This position is not tenable. It is true that Smith contested the validity of Knowles's entry, but at the same time he maintained the validity of his own, and in his affidavit of contest swore that immediately after making entry he established his residence on the land, and had since continuously resided thereon. In this affidavit he clearly claimed a right to the possession of the land in controversy under his entry of October 9, 1882, and at the hearing ordered by the Commissioner each party was to submit "any evidence he may have to offer in support of his claim." In support of his claim it was as important to Smith to show compliance with the homestead law on his part as it was to show non-compliance on the part of Knowles, and this seems to have been his understanding at the time of the hearing, as he actually did introduce testimony for the purpose of showing such compliance.

On a full consideration of the evidence, the conclusion reached by the local officers and by your office, that Smith had not up to the time of the hearing established a residence on the land in controversy, and that "he has forfeited any right which he may have acquired under his entry," is concurred in by the Department.

* * * * *

TIMBER CULTURE ENTRY—DESERTED WIFE.

GIBLIN *v.* MOELLER'S HEIRS.

Proof of temporary absences on the part of the husband, and of non-cohabitation for a year, would not warrant the allowance of a timber culture entry to a married woman, claiming the right as a deserted wife and head of a family.

Acting Secretary Muldrow to Commissioner Sparks, October 27, 1887.

I have considered the case of Bridget Giblin *v.* the heirs of John Moeller on appeal by Giblin from your office decision of December 28, 1885, rejecting her application to enter the NE. $\frac{1}{4}$ of Sec. 26, T. 121 N., R. 56 W., Watertown, Dakota land district, and awarding the preference right to enter said land to Jay C. Bush.

Moeller made timber culture entry June 7, 1881, for the land in controversy. On June 9, 1884, Bridget Giblin filed affidavit of contest and at the same time filed her application to make timber culture entry for the land. In her affidavit she states that she is "a married woman but that she is the head of a family of three children, and that her husband James Giblin, has abandoned and deserted herself and family and has been absent for many months and has finally abandoned them."

The local officers rejected this application to contest because applicant was a married woman and therefore disqualified from making entry for the land under the timber culture laws. From this decision of the local officers Mrs. Giblin appealed, and on August 14, 1884, you reversed their decision saying: "The question of whether she is a deserted wife as alleged, and the head of a family are subjects for inquiry during the proceedings of contest."

In the meantime, on the 9th day of June 1884, and after Mrs. Giblin had filed her contest affidavit and application to enter, Jay C. Bush filed in the local office an affidavit of contest against Moeller's entry, together with application to make timber culture entry for the same land.

A hearing was ordered under Bush's contest July 28, 1884, at which time Moeller did not appear and Bush submitted testimony sustaining the allegations in his contest affidavit. The local officers found in favor of contestant and no appeal was taken from that decision.

On November 28, 1884, a hearing was had on Mrs. Giblin's contest affidavit, at which the defendant Moeller made default and the contestant submitted testimony sustaining the allegations of failure to comply with the requirements of the timber culture law (the statement in your letter that she submitted no testimony on this point being an error), and the local officers find that no part of said land had been planted to trees, tree seeds, or cuttings, although the third year after entry had expired.

On that day Jay C. Bush appeared by attorney and moved that he be allowed to show that Mrs. Giblin was not a legally qualified contestant, and that he (Bush), had a prior right of contest. This motion was

granted, testimony heard, and the local officers decided that Mrs. Giblin was not a deserted wife, and therefore not qualified to make entry, and that her contest should be dismissed and the contest of Bush be allowed to stand. From this decision Mrs. Giblin appealed.

Your decision of December 28, 1885, holds that Mrs. Giblin is disqualified from making entry and her application is of no effect, and hold Moeller's entry for cancellation with "a preference right in Bush provided Mrs. Giblin is not then qualified to enter the land."

From this decision Mrs Giblin appealed.

Both contestants produced testimony at the respective hearings sufficient in the judgment of the local officers to authorize the cancellation of the entry, and their decisions on that point not having been appealed from by the entrymen or his heirs, it is unnecessary to discuss that question here.

The application of Mrs. Giblin to contest and make entry for said land was on its face regular and should have been received by the local officers, and their action in allowing a hearing on the application of Bush pending Mrs. Giblin's appeal, was irregular. Since, however, Mrs. Giblin was afterwards accorded an opportunity to present her claims and had a full hearing, she was not deprived of any right.

After a careful consideration of the testimony I am of the opinion that, Mrs. Giblin has not only failed to show that she is a deserted wife and the head of a family, but that the preponderance of the testimony is against her. It is shown that she resides with her husband and children upon a homestead claim entered in the name of her husband. While she claims that he has done nothing towards the support of the family, yet the testimony of several neighbors shows that he worked about the farm as farmers usually do.

It is further shown that while he left his family in December 1883, he returned in June following, about the 9th or 10th, and that during the time of his absence he wrote to one of the boys, and directed that they should do plowing on this land in controversy, and saying that he would be at the land office to begin the contest. It appears clearly that there were frequent quarrels between Giblin and his wife and that they had not cohabited as husband and wife for more than a year previous to the initiation of this contest. All these facts do not, however, show that she is the head of the family, and I therefore affirm your finding that Mrs. Giblin was not qualified to make the entry.

Bush's application to contest and to enter the land having been allowed by the local officers, and Mrs. Giblin not being qualified to make entry, his entry should be allowed to stand. Your decision is accordingly affirmed.

PRE-EMPTION—SECOND FILING.

ALLEN *v.* BAIRD.

Under section 2261 of the Revised Statutes a pre-emptor may file but one declaratory statement for land free to settlement and entry. The only exception is where the pre-emptor, through no fault of his, is unable to perfect his entry on account of some prior claim.

Secretary Lamar to Commissioner Sparks, November 2, 1887.

I have considered the case of Ethan J. Allen *v.* Perry E. Baird, as presented by the appeal of the former from the decision of your office, dated December 24, 1885, holding for cancellation his pre-emptory declaratory statement, No. 20,475 filed March 14, 1883, upon the NE. $\frac{1}{4}$ of Sec. 15, T. 105 N., R. 60 W., at the Mitchell land office, in the Territory of Dakota, and awarding said tract to said Baird.

The record shows that Allen alleged settlement on said tract on February 5, 1883, and offered proof and payment on September 17th same year.

Baird made homestead entry No. 24,891 of said tract on April 13, 1883, and offered his commutation proof on September 20th following.

A hearing was had on December 31, 1883, to determine the rights of the respective parties. From the evidence submitted the local land officers held that Baird was the prior settler and that his proof ought to be accepted and the proof offered by Allen rejected. The evidence showed that Allen, on August 18, 1880, filed his pre-emption declaratory statement, No. 13,876 for the NW. $\frac{1}{4}$ of Sec. 28, T. 105 N., R. 59 W., alleging settlement thereon August 14, 1880. The effect of such former filing was sought to be avoided upon the ground that at the date thereof Allen was not twenty-one years of age, and hence said filing was a nullity and no bar to a second filing.

Your office, however, decided that the second filing was illegal upon the authority of the departmental decision in the case of French *v.* Tatro (2 C. L. L., 585), which holds that a second filing may be allowed where the first was made through no fault of the settler, and the equities therein are manifest; but that to allow a second filing by one who knew that his first filing was illegal would be allowing a party to take advantage of his own wrong.

In the first filing Allen stated that he was "over twenty one years of age" when he knew that statement was untrue.

The land was subject to settlement and entry and Allen cannot now be heard to say that his first filing was illegal. The question of second filing was carefully considered by my predecessor Secretary Teller in the case of J. B. Raymond (2 L. D., 854), wherein it was held, that under the provision of section 2261 Revised Statutes, a pre-emptor may file but one declaratory statement, for land free to settlement and entry. This ruling has been uniformly followed and the only exception

is where the pre-emptor is unable to perfect his entry on account of some prior claim, and there is no fault on his part. General Circular p. 7, Circular of October 25, 1884, (3 L. D., 161), George Osher (4 *id.*, 114), Goist *v.* Bottum (5 *id.*, 643), Baldwin *v.* Stark (107 U. S., 463).

In the case of Ross *v.* Poole (4 L. D., 116), this Department affirmed your office decision that the pre-emptor "may again exercise the pre-emption privilege in view of the fact that he was not personally qualified to make the first." But an examination of that case shows that the pre-emptor Ross believed that he was a citizen because his father had declared his intention to become a citizen of the United States during the minority of the pre-emptor, and there was no fault on his part; hence that case is in harmony with the principle above enunciated.

In the case of Clayton M. Reed (5 L. D., 413), this Department refused to allow the pre-emptor to make a second filing where his pre-emption cash entry had been canceled for illegality, and it was held that "Reed must be charged with a knowledge of the law, and cannot be heard to plead ignorance of it. His attempt to acquire title to the tract in question was illegal throughout. In that attempt he has exhausted his pre-emption right. To allow him now to file again would, in my opinion, be a violation of law, and would allow him to take advantage of his own wrong."

I concur, therefore, in the conclusion of your office, that the filing of Allen should be canceled.

By your office letter of October 1, 1887, was transmitted the affidavit of one H. H. Austin, alleging that said entry and filing are illegal. Said affidavit has not been considered in arriving at the conclusion herein, and the same is returned, herewith, for such action as you may deem appropriate.

The decision of your office holding said filing for cancellation is accordingly affirmed.

As to the question of the sufficiency of the commutation proof of Baird the case is returned to your office for further consideration, in view of the affidavit filed by said Austin.

PRACTICE—AFFIDAVIT OF CONTEST—REVIEW.

SEITZ *v.* WALLACE.

As the affidavit of contest is only in the nature of an information and not essential to a contest, and jurisdiction is acquired by service of notice and not by the contest affidavit, the authority of the Land Department to entertain a contest is not abridged by the fact that the affidavit of contest was filed *before* the expiration of the period covered by the charge where the notice was served *after* such period.

A review will not be granted on the ground that the decision is against the weight of evidence when there is contradictory evidence on both sides.

A charge of failure to plant the required number and amount of trees at any time during the third year after entry and failure to cultivate and protect at any time the trees that had been planted, is sufficient for the local officers to act upon.

Secretary Lamar to Commissioner Sparks, November 2, 1887.

George H. Wallace, by his attorney, has filed a motion for review and revocation of departmental decision, dated June 3, 1887, in the case of *J. L. Seitz v. said Wallace*, involving the NE. $\frac{1}{4}$ of Sec. 22, T. 20 S., R. 3 W., Salina, Kansas.

The grounds upon which this motion is based are:

First, Said decision is contrary to law.

Second, Said decision is not supported by the evidence and is contrary to the evidence.

Third, Certain of the contestant's witnesses (naming them) are not entitled to credit.

Fourth, The contest affidavit does not state a cause of action, and

Fifth, Numerous other reasons apparent of record.

These allegations of error may be disposed of *seriatim*. And first it may be said that the first alleged error is somewhat indefinite. In what particulars the decision complained of is contrary to law is not made apparent and such allegation might be dismissed for not being explicit; but it will be answered. Said decision is *not* contrary to law. The finding of facts in said decision were to the effect that not nearly ten acres of timber had been planted and that what had been planted had not received proper cultivation. The evidence in the case was taken long after the expiration of four years from date of entry, and it also showed that the entryman had repeatedly offered his claim for sale. Under such circumstances it is not apparent from the above finding of facts how a decision which canceled the entry on contest could be "contrary to law." But it is urged that the contest was initiated prior to the expiration of four years from date of entry. It is true that the affidavit of contest was filed before the four years had expired; but the notice of contest was not served until some time *after* the expiration of said four years. It has been uniformly held that jurisdiction vests in the local office by service of notice and not by the affidavit of contest. *Houston v. Coyle* (2 L. D., 58), *Gotthelf v. Swinson* (5 id., 657). The affidavit is only in the nature of an information, and has been held to not be essential in a contest. The rules of practice require it as an evidence of good faith on the part of the contestant; but contests have been allowed where no affidavit had been filed at all.

Again, under the decisions of the Department, an entryman may show compliance with the law after the affidavit of contest is filed, but before notice is served upon him; and conversely, it has been uniformly held, that the government being a party in interest in every contest, is not precluded from taking advantage of information on the merits of the case brought out in the progress of a trial. *Litten v. Altimus* (4 L. D., 512), *Smith v. Brandes* (2 id., 95), *Condon v. Arnold* (id., 96). Said decision then, upon the finding of facts is not contrary to law.

The evidence in the case was given a very careful examination when the case was here before. To be sure the decision rendered is brief, and does not set out the findings of fact in detail; but that does not show that the case was not properly considered. It often occurs in the progress of business before the Department that a case which has received a lengthy and careful examination can be disposed of with a very short decision. This is done to expedite business and is perfectly justifiable. It was found when the other decision in the case was rendered that the evidence was exceedingly conflicting and much of it entirely irreconcilable. The local officers with the witnesses before them and with an opportunity to observe their demeanor on the stand while testifying believed that contestant's witnesses told the truth, and that the entryman's witnesses could not be relied upon to that extent. Your office thought otherwise, and accordingly reversed the decision of the local officers recommending the cancellation of said entry. There is certainly a great deal of evidence in this case which goes to show that the law had never been complied with, and that without regard to the evidence of the witnesses who are now attacked in the motion under consideration. It is equally true that there is evidence on behalf of claimant tending to show a compliance with the law. The weight of this evidence was carefully considered when the case was here before and was in the opinion of the Department decidedly in favor of the contestant. There was certainly enough evidence to warrant a verdict in his favor, and the Department so finds now. It is well settled that a motion for review and revocation will not be granted on the ground that the decision complained of is against the weight of the evidence when there is contradictory evidence on both sides. *Long v. Knotts* (5 L. D., 150), *Neilson v. Shaw* (id., 387). This disposes of the second and third objections.

The affidavit of contest charged a failure on the part of claimant to plant the required number and amount of trees at any time during the third year after entry, and also charged failure to cultivate and protect at any time the trees that had been planted. This charge was sufficient for the local officers to act upon. The charge of failure to cultivate and protect the trees at any time was in itself a sufficient charge. Further, "any question involving the sufficiency of information upon which the local office elected to proceed disappears from the moment that notice is issued." *Houston v. Coyle* (*supra*). This is all that need be said with reference to the fourth objection.

The fifth objection is more vague and indefinite than the first. What these "numerous other reasons" why the decision complained of should be revoked are, is not stated. Nor are they "apparent of record," as is alleged. Such an objection need not be discussed at length.

It is clear to the Department that Wallace up to the date of hearing had not complied with the requirements of the law under which his entry was made, and the logical result must follow, viz: that his entry should be canceled.

The motion is denied.

CALIFORNIA SCHOOL LANDS—ACT OF MARCH 1, 1877.

D. C. POWELL.

The intent of the act of March 1, 1877, was to confirm to the State all defective or invalid selections which had been made and approved to the State prior to its passage, excepting (1) those occupied by *bona fide* settlers prior to such certification, (2) those mentioned in the first proviso to the second section of said act, and (3) those selections made in lieu of a sixteenth or thirty-sixth section which had been surveyed in place and the title to which had vested in the State at the date of said selections.

Selections made for losses alleged by reason of the school sections being included within a Spanish or Mexican grant, and approved before the passage of said act were confirmed by the second section thereof, even though on final survey of such grants or upon approved surveys of the public lands it transpires that the bases of such selections were not in fact lost as alleged; and as a consequence of such confirmation the United States resumed the ownership of such bases.

Secretary Lamar to Commissioner Sparks, November 3, 1837.

This is an appeal by D. C. Powell from your office decision, dated January 26, 1886, rejecting his application to enter the SW. $\frac{1}{4}$ of Sec. 9, T. 28 S., R. 10 E., M. D. M., San Francisco, California, under the provisions of the second section of the act of March 1, 1877 (19 Stat., 267).

The tract specified was selected by the State of California June 22, 1869, as an indemnity school selection, R. & R. No. 2131, in lieu of the SW. $\frac{1}{4}$ of Sec. 16, T. 22 S., R. 6 E., M. D. M., alleged to be within the patented limits of the Rancho San Miguelito; and said selection was approved to the State May 16, 1870, in clear list No. 14.

The approved plat of township 22 S., range 6 E., was not filed until July 18, 1884. It was then ascertained that the SW. $\frac{1}{4}$ of Sec. 16 in said township, in lieu of which the aforesaid selection had been made, had not been included in the Rancho San Miguelito as patented August 8, 1867, but on the contrary was vacant public land surveyed in place.

The question to be decided here is: Was the aforesaid selection confirmed to the State of California by the second section of the act of March 1, 1877 (*supra*); and, as a corollary thereof, did the United States resume ownership of the southwest quarter of said section sixteen—the basis of said selection—the title to which upon survey of the township would have vested in the State under the school land grant of March 3, 1853 (10 Stat., 244)?

Your office decision answers this question in the affirmative, and its reversal is asked mainly on the alleged ground of lack of authority on the part of the United States to resume ownership of said tract in section sixteen, and therefore failure of said act of March 1, 1877, to confirm said lieu selection.

The sixth section of the act of March 3, 1853, granted to the State of California the sixteenth and thirty-sixth sections of land in each township in said State for school purposes.

By the seventh section of the same act indemnity was provided for such sections, or parts of sections, as might be occupied by actual settlers at the date of survey, or where such sections were reserved for public uses or taken by private claims, and thereby lost to the State. When the government surveys were extended over the State it was found that many of the sixteenth and thirty-sixth sections were located within the claimed limits of Spanish or Mexican private grants, the boundaries of which had not been specifically determined by final survey.

Without waiting to ascertain whether such sections would be included within the final survey of such private grants, the State, upon the bare allegation that such school sections had been lost to her, proceeded to make indemnity selections in lieu thereof. In many instances two or more selections were made in lieu of the same section; in others, selections were made in lieu of a sixteenth or thirty-sixth section which never existed; in others, selections were made in lieu of a sixteenth or thirty-sixth section which had already been surveyed in place and the title to which had become vested in the State; and in others the lands selected as indemnity were in a state of reservation at the date of selection and such selections were invalid for that reason.

Nevertheless the land department certified such selections to the State as valid selections. In the meantime, settlers had gone upon some of the selected lands, some before and some after the date of certification, and were setting up claims to them under the pre-emption law. Great confusion was thus occasioned respecting these conflicting claims. To remedy the existent affairs and quiet titles long in dispute, the act of March 1, 1877 (*supra*), was passed.

The second section of this act (the only part which is directly under consideration in this case) provided:—

That where indemnity school selections have been made and certified to said State, and said selections shall fail by reason of the land in lieu of which they were taken not being included within such final survey of a Mexican grant, *or are otherwise defective or invalid*, the same are hereby confirmed, and the sixteenth or thirty-sixth section in lieu of which the selection was made shall, upon being excluded from such final survey, be disposed of as other public lands of the United States: *Provided*, that if there be no such sixteenth or thirty-sixth sections, and the land certified therefor shall be held by an innocent purchaser for a valuable consideration, such purchaser shall be allowed to prove such facts before the proper Land Office, and shall be allowed to purchase the same at \$1.25 per acre, not to exceed three hundred and twenty acres for any one person; etc.

This section of the act first came before the Department for construction in the case of *Rasmus Jackson et al. v. The State of California*, decided August 10, 1877 (4 C. L. O., 87). It was there held that said section confirmed to the State all indemnity school selections which had been certified prior to its passage, excepting those for lands occupied by *bona fide* settlers prior to certification, and excepting also the class named in the first proviso thereof which were not confirmed, but were

simply subject to the right of purchase from the government by the innocent purchaser from the State.

Motion for review of said decision was made by the attorneys for the settlers, and upon their request the Secretary submitted the question to the Attorney General. Under date of July 12, 1878, that officer rendered an opinion (16 Opin., 69), in which the views of the Department as above stated were fully sustained.

Speaking of this act the Attorney General says:

The statute is in its nature a remedial statute, is to be construed generously in order to give to the State the benefit it was entitled to receive for school purposes and to relieve the difficulties which had arisen in the State by reason of the peculiar complications from the Mexican grants.

And again:—

It is not questioned that the effect of this section is to confirm to the State of California the selection of lands made by it as indemnity for those sections which have *since* been found not to have been included within the final survey of a Mexican grant, and to reinvest the United States with the title thereto, to be disposed of as other public lands of the United States.

The main question discussed by the Attorney General was as to the construction of the words, "or are otherwise defective or invalid." And upon that question he said:—

In the view of the case which presents itself to me, it seems that these words are intended to confirm to the State, in spite of any defects or invalidities which have existed in its selections other than the defect arising from the fact that there was no original basis for the selection, the lands selected, and that a confirmation of this character can only be interpreted properly in the nature of a grant *de novo* of the lands thus selected.

This opinion was followed by the Department in the case of *Jackson et al. (supra)* on review July 17, 1878 (L. & R., Vol. 24, 313), and also in the matter of the application of State Surveyor-General of California to have an indemnity school selection canceled for invalidity, decided September 6, 1880 (L. & R., Vol. 30, 69). The facts in this last case were in many respects similar to those in the case at bar. The selection had been made in 1869 and certified to the State in 1870, in lieu of a part of a thirty-sixth section, which the State alleged it was compelled to relinquish for the reason that the section was in a grant. It was known at the date of said decision that the section was in place and unsurveyed public land; and it was held that the tract in lieu of which the selection had been made, when surveyed, should be treated as excluded from a final survey within the meaning of the act of 1877, and the selection as confirmed by the act.

The subject again received an elaborate consideration at the hands of Secretary Schurz, November 22, 1880, in a letter to the Commissioner of the General Land Office relating to the adjustment of the school land grant to California, and the former rulings were sustained. In this let-

ter the Secretary after referring to the foregoing authorities goes on to say :—

Hence, without recapitulating or further particularizing the classes of selections confirmed by said act, according to the construction thereof adopted by the Department, as shown above, it may be stated as a rule for future guidance in adjusting the grant that, in all cases of defective or invalid indemnity school selections made and certified prior to the passage of the Act, wherein by *approved public surveys*, or by the final surveys of Mexican grants, it has been, or may hereafter be ascertained, that the deficiencies or losses in lieu of which the selections were made, actually exist; and in all cases wherein it shall appear that the selections were made in anticipation of the surveys of Mexican grants in lieu of sixteenth or thirty-sixth sections, supposed or alleged by the State to be lost in such grants, but where, upon final survey of such grants, or by *approved public surveys*, made or approved after the passage of said act, such school sections shall be found in place, and not included in any grant, the selections will be treated as confirmed, provided the selected lands were subject to Congressional disposition at the date of the act.

And again :—

The words “such sixteenth and thirty-sixth sections,” found in the first proviso to the Act, are construed to embrace and mean such school sections, designated as the bases of selections, as might be excluded from the final surveys of grants, or *found in place by public surveys after the passage of the act*.

This language would seem to fairly apply to the case at bar, and to rule it as your office did in the decision appealed from.

The evident intent and object of the statute of March 1, 1877, was to confirm to the State all defective or invalid selections which had been made and approved to the State prior to its passage, excepting those occupied by *bona fide* settlers prior to such certification, excepting also those mentioned in the first proviso to section two of said act, and excepting also those selections made in lieu of a sixteenth or thirty-sixth section which had been surveyed in place and the title to which had become vested in the State at the date said selections were made. *Watson v. California* (6 C. L. O., 193).

In cases like the one under consideration, where the State before selecting indemnity alleged that the school sections or a part thereof had been lost to her by reason of the same being included within a Mexican or Spanish private grant, and where such selection had been approved to her before the passage of the confirmatory act of March 1, 1877, it is the opinion of the Department that such selections are confirmed by that act, even though upon final survey of such grants or upon approved surveys of the public lands it be found that the bases of such selections had not been lost as alleged; and as a corollary thereof that the United States thereby resumed ownership of such bases.

This ruling appears to be plainly deducible from the act itself, and the principle of it is announced in the rulings heretofore cited.

Your office decision is affirmed.

*HOMESTEAD SETTLEMENT—ACT OF MAY 14, 1880.**WATTS v. FORSYTH.*

The failure of a homestead settler to make entry within the period provided by the act of May 14, 1880, renders his claim subject to any valid intervening settlement right.

Secretary Lamar to Commissioner Sparks, November 3, 1887.

I have before me the record in the case of Francis M. Watts v. Thomas Forsyth, involving the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 33, the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, and the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 34, T. 22 S., R. 14 E., Tucson, Arizona, and certified to this Department in response to its decision of May 7, 1887 (5 L. D., 624).

The plat of township survey was first filed February 22, 1877, and refiled March 6, 1884.

November 6, 1884, Forsyth filed pre-emption declaratory statement for the land described, alleging settlement September 18, 1884, and on December 15, 1884, Watts made homestead entry of the same land.

April 23, 1885, a hearing was had to determine the priorities of the respective parties, and the local office decided that Watts had the superior right to the land. From this decision Forsyth took no appeal, and August 13, 1886, your office affirmed said decision and canceled the filing of Forsyth.

November 11, 1886, in disposing of Forsyth's appeal from the decision of your office it was held that as he had failed to appeal from the decision below the case must be closed. Whereupon Forsyth made application for writ of certiorari which was granted and the record of the case is now before the Department.

It appears that on October 5, 1886, Watts filed in the local office a relinquishment of his entry dated September 29, 1886, and that said entry was thereupon canceled and F. S. Lamberson permitted to make homestead entry of the land.

From the evidence submitted at the hearing the local office found that Watts was the first settler on the land, having commenced improvement and cultivation in January, 1884, and that he was residing on the land at the date of Forsyth's settlement. That Forsyth is an actual settler and is showing due compliance with the law.

On this finding of facts the land was accorded to Watts by the local office, and your office affirmed that decision.

From an examination of the evidence the facts appear as found in the decision under consideration, but it was error to hold thereon that Watts had the prior right to the land. As was said in the departmental decision rendered on the application for certiorari herein (5 L. D., 624), "the settlement of a homesteader (claiming under the act of May 14, 1880), is only protected by said statute as against other and later set-

tlers for the period of three months, after which the next settler in point of time, who has complied with the law, takes the land."

Although Watts was the first settler he did not make entry within the statutory period following said settlement, hence his right became subject to any valid intervening settlement right. Forsyth acquired by his settlement and filing such a right, and the entry of Watts was subject thereto.

The decision of your office is accordingly reversed, the filing of Forsyth is re-instated, and the entry of Lamberson held subject thereto. Due notice of this decision should be given said Lamberson.

PRE-EMPTION FINAL PROOF—RESIDENCE.

R. T. HEMING.

Temporary absence in the discharge of an official duty, after a period of continuous residence greater than required by law, does not constitute abandonment.

Secretary Lamar to Commissioner Sparks, November 5, 1887.

I have considered the appeal of R. T. Heming from the decision of your office, dated November 12, 1885, rejecting his final pre-emption proof for the SE. $\frac{1}{4}$ of Sec. 5, T. 6 S., R. 35 W., Oberlin, Kansas.

Said decision states that said Heming filed his pre-emption declaratory statement No. 17,469 for said tract on June 22, alleging settlement April 10, 1880; that the proof, made May 11, 1885, and the evidence supplemental thereto, show that the claimant is a qualified pre-emptor; that his residence was continuous from April, 1880, to December, 1883; that in the spring of 1881 claimant was appointed postmaster and kept the post office in his house on the land until December, 1883, when it was removed to a place named Quicksilver since which time he has lived at the latter place.

The local land officers report that the entryman has "acted in good faith, but they did not feel authorized to issue final certificate, as the proof did not show that the entryman's residence continued on said tract up to the date when the same was offered." Your office decided that "the fact that Heming, while holding his pre-emption claim, accepted an office the duties of which required his attendance elsewhere, can not excuse his failure to comply with the regulations under the law in the matter of continuous residence."

The facts disclosed by this record show that Heming kept the post office on his land, and was actually residing thereon for almost three years, and he only went to Quicksilver, when the post office was removed to that place, to perform his official duties.

There is no adverse claimant, and the claimant's good faith is beyond question. The record shows that the claimant never abandoned said

land, and his temporary absence, under the circumstances of this case was excusable. His pre-emption proof should be accepted.

The decision of your office is reversed, and you will please return the proof to the local land officers, and direct them to issue final certificate thereon upon payment of the legal charges.

PRE-EMPTION FINAL PROOF—ADVERSE CLAIM.

WADE *v.* MEIER.

A pre-emptor who, in the presence of an adverse claim, elects to make final proof must abide the result thereof, and submit to an order cancelling his filing, in the event that his proof fails to show due compliance with the law.

Secretary Lamar to Commissioner Sparks, November 5, 1887.

The case of Edward Lee Wade *v.* Christian Meier, involving the SW. $\frac{1}{4}$ of Sec. 12, T. 15 N., R. 1 E., M. D. M., Marysville, California, is before me on appeal by Meier from your decision of November 25, 1885, holding for cancellation his pre-emption filing for said tract.

Meier filed pre-emption declaratory statement for said land April 8, 1884.

Wade filed pre-emption declaratory statement for the same July 1, alleging settlement June 30, 1884.

Meier offered final proof November 2^d, 1884, at which time you state that "Wade appeared and cross examined Meier's witnesses and introduced testimony." The local officers recommended Meier's entry for cancellation, and your said decision affirmed the action below.

Meier testified that he went on the land during the first part of April, 1884, and remained three days, during which time he built a cabin eight and one half feet square; that he spent two days thereon in the middle of May, and about two nights in June; that he visited said land about August 1, and again some two weeks thereafter. He seems to have been on the land about the first of September, from which time until his final proof he remained three or four nights. Meier appears to have done a little plowing and dug a well.

Wade completed his house on the land July 3, 1884, and with the exception of eight days during said month resided therein continuously until Meier offered final proof, to wit, November 26, 1884. His house was of boards twelve by twelve feet, with shake roof. He also plowed about one half an acre.

Meier, in assertion of his claim to enter and purchase the land, under the pre-emption law, elected to make final proof, in the face of the recorded notice of Wade that he too intended to claim the tract under the same law.

Because of the presence of this adverse claim, Meier must stand or fall by the record made by his final proof. That record shows that he

failed to comply with the essential requirements of residence and improvement: therefore his filing must be canceled, and the right to enter the tract awarded to Wade, who, invited by Meier's notice, has shown the better right.

In view of the foregoing your decision is affirmed.

INDEMNITY—WITHDRAWAL—REVOCATION; RES JUDICATA.

BLODGETT v. CENTRAL PAC. R. R. CO.

An application rejected because of an existing indemnity withdrawal, and pending on appeal, may be allowed, where the withdrawal is revoked, as of the date when the land became subject to such appropriation under the order of revocation.

The final rejection by the Department of a claim for land, preferred under a specified statute, does not preclude a subsequent application by the same party under a different law.

Secretary Lamar¹ to Commissioner Sparks, November 5, 1887.

I have considered the case of Phillip Blodgett v. Central Pacific Railroad Company (Oregon Branch), as presented by the appeal of the latter from the decision of your office, dated February 13, 1886, accepting the application of said Blodgett to enter under the homestead laws, the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 21, the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 28, and the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 27, T. 33 N., R. 1 W., M. D. M., transmitted by the local land officers at Shasta in the State of California, on October 27, 1885.

The record shows that the tracts in the odd numbered sections are within the thirty mile indemnity limits of the withdrawal for the benefit of said company, under the act of Congress approved July 25, 1866 (14 Stat., 239), and no selection had been made by the company of said tracts.

Your office rejected the claim of the company, and held that said land was subject to entry "under the principles announced in the case of *Miller v. Northern Pacific Railroad Company* (12 C. L. O., 135)."

It appears that Blodgett on June 18, 1875, applied to file his pre-emption declaratory statement for said land, alleging that the land within the railroad limits was excepted from the withdrawals for its benefit. A hearing was had and the application of Blodgett was finally rejected by departmental decision dated April 7, 1879.

Your office holds that said departmental decision does not conclude the right of Blodgett to make application for said land under a different law, and I think your conclusion is correct.

It will not be necessary to pass upon the correctness of your office decision in the *Miller* case (*supra*), now pending in this Department on appeal, for, since the decision of the case at bar, the indemnity with-

* Decision of the General Land Office, rendered July 13, 1885.

drawal for the benefit of the Central Pacific Company, has been revoked and the lands restored to the public domain.

The application of Blodgett should be allowed to date from the time when under said order of revocation, applications and filings could be received at the local land office.

The decision of your office is modified accordingly.

COMMUTATION PROOF—IMPROVEMENTS—GOOD FAITH.

GEORGE R. GARLICK.

While no fixed rule can be formulated which shall govern every case that may arise as to the good faith of an applicant for public land, yet in the matter of improvements it is proper to consider the degree and condition in life of an entryman in determining whether he has shown good faith therein.

Secretary Lamar to Commissioner Sparks, November 5, 1887.

I have considered the appeal of George R. Garlick from the decision of your office, dated December 4, 1885, affirming the action of the local land officers rejecting his final commutation proof made before the clerk of the district court of Campbell county, in the Territory of Dakota, on October 8, 1885, in support of his claim to the SE. $\frac{1}{4}$ of Sec. 20, T. 126, R. 76, covered by his homestead entry No. 4302, made March 26, 1885, at the Aberdeen land office, in said Territory.

The final proof submitted shows that said Garlick was duly qualified to make said entry; that he is a single man; that he first settled upon said land March 26th, and established his actual residence thereon March 28, 1885; that his improvements consist of a frame house, eight feet by ten feet, a good well, ten feet deep, and ten acres of breaking—all valued at \$175; that he has resided continuously upon said tract since establishing his residence; that he was absent, temporarily, during harvest, for a period of about four weeks, earning money to pay for his improvements, and that the claimant has acted in entire good faith in the premises. The proof was transmitted to the local land officers and was rejected by them, for the reason "that the character and extent of the improvements fail to establish the claimant's good faith."

On appeal, your office affirmed the action of the local land officers, for the reason "that a party taking advantage of a privilege granted him under Section 2301 of the Revised Statutes must be prepared to establish his good faith beyond question. In case of a doubt, the judgment of the register and receiver, who are, as the representatives of this office, supposed to know the facts of the case, will be relied upon."

The testimony in the case at bar was taken before the clerk of the court, and hence the register and receiver had no opportunity of observing the witnesses and noticing their demeanor while testifying. It is not denied by the local officers and your office that the witnesses

have told the truth as to the extent and character of the improvements made upon said land, and the sole question at issue is, do they show good faith on the part of the applicant?

In the case of *Hosmer v. Wallace* (97 U. S., 575), the supreme court decided that "a bona-fide 'pre-emption claimant' is one who has settled upon lands subject to pre-emption, with the intention to acquire them, and, who, in order to perfect his right to them, has complied, or is proceeding to comply in good faith with the requirements of the pre-emption laws."

The Department has held that no fixed rule can be established which shall govern every case that may arise, relative to the good faith of the applicant. It is right and proper to take into consideration "the degree and condition in life of the entryman," in determining whether the improvements made by him show good faith. *Eugen v. Sustad* (11 C. L. O., 215). The right to commute is a statutory right. Section eight of the original homestead act of May 20, 1862 (now 2301 R. S.), provides that the homestead entryman shall have the right to pay the minimum price for the land so entered, "at any time before the expiration of the five years," on making proof of settlement and cultivation, as provided by law granting pre-emption rights. The local land officers and your office hold that the final proof does not sufficiently show the claimant's good faith. It does not, however, appear that the claimant has acted in bad faith, and he should be allowed to make new proof within the lifetime of his said entry, showing full compliance with the requirements of the law.

Said decision of your office is accordingly affirmed.

HOMESTEAD ENTRY—RESIDENCE—EQUITABLE ADJUDICATION.

MARTHA M. OLSON.

Absence occasioned by insanity, ill health and poverty held excusable, and the time covered thereby considered as a part of the required term of residence.

On the submission of final proof by the deserted wife of a homesteader the entry may be sent to the Board of Equitable Adjudication.

Secretary Lamar to Commissioner Sparks, November 9, 1887.

I have considered the appeal of Martha M. Olson, deserted wife of Gustav Olson, from your office decision of March 6, 1886, rejecting her final proof, under homestead entry No. 10,795, for the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 12, T. 146 N., R. 58 W., Fargo, Dakota, land district.

Gustav Olson made entry for this land June 15, 1882, and on October 23, 1885, Martha M. Olson, as agent of said Gustav Olson, gave notice that she would, on December 8, 1885, submit final proof. The proof was not submitted until December 16, 1885. Because of this difference, the register and receiver submitted the matter to your office.

On March 6, 1886, your office decision was rendered, holding that the law had not been complied with in the matter of residence, and hence it was not a case for the Board of Equitable Adjudication, the final proof was rejected, but, in view of all the circumstances of the case, the entry was allowed to stand and Mrs. Olson permitted to submit new proof, at any time she could show a strict compliance with the law. From this decision Mrs. Olson appealed.

The only excuse given for failure to make proof on the day advertised as shown by claimant's affidavit is, "I was not aware of the date set for taking testimony in this proof was December 8, 1885, that I expected to be notified of that date by my attorney, but did not learn thereof before yesterday; that I am in poor health and unable to stand much travel in cold weather." This is not a sufficient excuse for the failure, and for this reason new proof should be made.

The facts as they appear from the final proof are, that actual residence was established in the spring of 1880. The improvements are a log house, fourteen by ten feet, board floor, two windows, warm and comfortable, and eleven acres under cultivation—valued at \$200.

Olson, with his family, resided on the tract until January, 1883, when he, "a drunken worthless fellow," deserted his wife and six children. His wife, being sick and unable to care for herself and children, was removed to her father's house on the same section, where she remained until March, 1884, when she was removed to the asylum for insane at Yankton. She returned from the asylum in August, 1885, and being, as she alleges, poor and unable to care for herself and children, continued to live with her mother, then a widow, until final proof was offered. She also says: "The improvements made on the land have been used for the purpose of supporting myself and children as far as possible."

You hold, "the only actual continuous residence maintained was from settlement in the spring of 1880 to January 1883, when the husband deserted his family. But there is no satisfactory evidence showing that the cultivation of the tract was kept up either by Mrs. Olson herself, during her sanity, or by a guardian or other persons acting for her during her alleged insanity. She seems to have abandoned the land as soon as her husband deserted his family."

In this conclusion I can not concur. The absence of Mrs. Olson from the land caused by sickness and poverty, and during her confinement in the asylum, is excusable, and such periods may be properly estimated as a part of the required five years of residence.

I would further suggest the character and extent of the cultivation and use of the land during Mrs. Olson's absence therefrom be fully shown, in the new proof. When the final proof is thus made, the entry should be referred to the Board of Equitable Adjudication for confirmation.

Your said office decision is modified in accordance with the views herein expressed.

FINAL PROOF—PUBLICATION OF NOTICE.

JOHN L. LOCKHART.

Final proof having been submitted without protest, after due notice, further advertisement is not required where supplemental proof is called for by the General Land Office.

The case of Forest M. Crosthwaite cited and distinguished.

Secretary Lamar to Commissioner Sparks, November 9, 1887.

On October 31, 1882, John L. Lockhart made homestead entry of the NE. $\frac{1}{4}$ Sec. 28, T. 114, R. 58, Watertown district, Dakota. November 15, 1883, he made commutation proof which was accepted by the register and receiver as sufficient. Said proof, however, was considered by your office to be insufficient, and rejected, and the entry held for cancellation. Lockhart appealed to the Department, which on November 20, 1885, so far modified your decision as to direct that he be "notified that he must furnish supplemental proof within ninety days of notice." Lockhart furnished such supplemental proof, showing that at date thereof (March 26, 1886—three years and four months after entry) he was residing on the land with his wife—having married since making his former proof; that since making his former proof his residence has been continuous, as it had been before except for occasional absences to earn a livelihood; that he has built upon the land a comfortable frame house, twelve by fourteen feet; that he has broken twenty-one acres of the tract, from which two crops have been harvested, and he was preparing the ground for another crop. Claimant's testimony, and that of his two corroborating witnesses, is full, clear and explicit. Your office, however, rejects it, on the ground that "said proof was made without advertisement," and adds by way of direction to the register and receiver, "you will therefore require him to advertise, as per instructions in case of Forest M. Crosthwaite (4 L. D., 406)."

From this action of your office Lockhart appeals to the Department.

The case at bar is widely different from that of Crosthwaite, referred to in your decision, in that Crosthwaite's advertisement contained a misdescription of the land, rendering it in fact no notice whatever of his intention to prove up on the tract he had entered. In the present case, claimant made proper advertisement at the time of offering his former proof. By that the public received all the notice the law requires, but no one appeared at the time and place advertised to protest. There the matter as between the claimant and the public ended. The supplementary proof called for by the Department was demanded for the information and satisfaction of your office—not of the public. I can not see that further advertisement is necessary.

I therefore reverse your decision, and direct that Lockhart's proof be accepted.

ENTRY—PATENT—EQUITABLE ADJUDICATION.

An outstanding patent, issued on an entry entitled to confirmation by the Board of Equitable Adjudication, should be returned and canceled before such confirmation.

Secretary Lamar to the Attorney-General, November 9, 1887.

I have the honor to submit for your consideration and concurrent action, fifteen private cash entries, as per list inclosed herewith, made at the Marquette land office in the State of Michigan. Said entries are "approved and recommended to the Board of Equitable Adjudication for confirmation" by the Honorable Commissioner of the General Land Office, with the statement that "these cases fall within the principle as laid down in the case of *Pecard v. Camens et al.* (4 L. D., 152) and are submitted under section 2456 Revised Statutes of the United States."

It appears that each of said entries has passed to patent and it is not stated that said outstanding patents have been surrendered or canceled.

Said section 2456 is as follows: "Where patents have been already issued on entries which are confirmed by the officers who are constituted the board of adjudication, the Commissioner of the General Land Office, upon the canceling of the outstanding patent is authorized to issue a new patent on such confirmation, to the person who made the entry, his heirs or assigns." This section is a revision of section two of the act of Congress approved March 3, 1853 (10 Stat., 258), which reads as follows: "And be it further enacted; that in all cases where patents have been issued on entries which were entitled to be confirmed under said act, such patents may be surrendered, and the officers at the time of such surrender, who by said act are constituted the Board of Adjudication, are hereby authorized and empowered to confirm such entries, and upon the canceling of the outstanding patent, the Commissioner of the General Land Office, is hereby authorized to issue a new patent, on such confirmation, to the persons who made such entries, to their heirs or to their assigns."

Since the meaning of section 2456 is not clear as to the time when the confirmation and the canceling of the outstanding patent shall be made, reference may be had to the original statute to construe the doubtful language. *United States v. Bowen* (100 U. S., 508), *Arthur v. Dodge* (101 U. S., 34), *Victor v. Arthur* (104 U. S., 498).

A careful examination of the original statute shows, I think, that it was the intention of Congress that the outstanding patent should be returned and canceled before any entry upon which patent issued should be confirmed. The general rule is that where a patent has been regularly issued for a part of the public domain the jurisdiction of the Department ceases over the land covered by the patent. *United States v. Schurz* (102 U. S., 378).

The case of Pecard *v.* Camens (*supra*) passed upon the validity of the entries, and held that they were not void but voidable, and could be submitted to the Board of Equitable Adjudication for confirmation. But the entries in that case had not been patented. I am therefore of the opinion that said entries should not now be confirmed for the reason that there is no evidence that the outstanding patents issued thereon have been returned and canceled. Until that is done, the Honorable Commissioner has no authority, in my judgment, to submit said entries to the said Board.

Should you concur with me, said entries will be returned to the Honorable Commissioner of the General Land Office, without confirmation for the reasons above set forth.

PRACTICE—APPEAL—SPECIFICATIONS OF ERROR—CERTIORARI.

RUDOLPH WURLITZER.

The filing of an appeal from the decision of the Commissioner removes the case from the jurisdiction of the General Land Office.

In all cases, whether appeals are defective under rule 82, or incomplete under rules 88 and 90, they are to be ultimately forwarded to the Department for its action.

In the absence of specifications of error an appeal will not be entertained.

If on the showing made for certiorari it is apparent that the applicant's appeal, if before the Department, would be dismissed, the writ will be denied.

Secretary Lamar to Commissioner Sparks, November 11, 1887.

On the 17th instant Rudolph Wurlitzer, for himself and associates, filed in this Department a paper which he clearly intends shall be treated as an application for certification under rules 83 and 84 of Rules of Practice of the record in mineral entry, No. 2568, Central City, Colorado, and the mill-site embraced in the application upon which said entry was based.

Said application for certiorari, which is somewhat vague and indefinite, sets out that your office, under date of March 10, 1887, decided that the use and occupancy of the mill-site tract was not such as is required by section 2337 of the Revised Statutes, and therefore held said mineral entry, No. 2568, for cancellation, in so far as it embraced said mill-site, and allowed sixty days for appeal; that pursuant to receipt of notice of said action applicant, under date of April 23, 1887, mailed his appeal to the register and receiver, in words as follows :

In answer to yours of the 22nd of March, I hereby notify you and through you the Hon. Commissioner of the General Land Office, that I, Rudolph Wurlitzer, for myself and co-claimants do hereby appeal from the decision of the Honorable Commissioner in the matter of the application for patent of the Leila Lode and Mill-Site, lots No. 1933, A. & B., under date of March 10, 1887.

Applicant evidently regards the letter quoted above as his appeal, and apparently labors under a misapprehension as to the ground of your office action thereon, for he states that, notwithstanding the fact that he mailed his appeal within half of the time allowed him, you, in view of the fact that the appeal did not reach your office until June 10, decided his right of appeal waived, and ordered his entry canceled as to the mill-site, and the case closed. Applicant has furnished no copy of your office decision, but personal inspection of the records of your office discloses the fact that the right of appeal was treated as waived and the case was considered closed, because no specification of errors had been filed. Rules 88 and 90 of Practice provide as follows:

Rule 88.—Within the time allowed for giving notice of appeal, the appellant shall also file in the General Land Office a specification of errors, which specification shall clearly and concisely designate the errors of which he complains.

Rule 90.—A failure to file a specification of errors within the time required will be treated as a waiver of the right of appeal, and the case will be considered closed.

Your office evidently based its action on these rules, and treated the case as one in which the right of appeal had by the failure to file specifications of error been waived and lost, and not (as appellant assumes) as one in which an appeal had been filed out of time.

It is well settled that a filing of an appeal from a decision of your office places the case to which it relates beyond your jurisdiction. *John M. Walker et al.* (5 L. D., 504) and cases cited.

What the applicant considers his appeal, your office treated as a mere notice of appeal, which did not take the case out of your jurisdiction, but was simply an announcement that in due time a complete appeal with specifications of error would be filed as a basis for invoking appellate authority. In this I think your office action was error. The applicant filed within time what may be regarded as an appeal—incomplete it is true for want of specifications of error, but nevertheless an appeal, for it contains the words “I * * * do hereby appeal.” Being in fact an appeal, and applicant having expected and intended that it should be so regarded, your office should not have closed the case but should have forwarded the appeal with the record in the case to which it pertained to the Department for its action.

The question as to the sufficiency of an appeal if filed in time is one for the appellate authority to pass upon. A distinction is to be drawn between cases to which rules 88 and 90 of practice apply, and those to which rule 82 is applicable in this, that when an appeal is by you considered defective under the last named, you are to notify the party of the defect in order that amendment may be made, while under 88 and 90 nothing remains for you to do but await the expiration of the time allowed for appeal, and then if the appeal is incomplete by reason of a failure to file specifications of error, forward the case for departmental action.

Rule 82 applies to cases where the appeal is defective not in its subject matter, but in such matters as the omission to serve notice thereof upon an opposing party.

In all cases, however, whether appeals are defective under rule 82 or incomplete under rules 88 and 90 they are to be ultimately forwarded to the Department for its action. While this is true, it is unnecessary to order up the record in this case as requested by the petitioner. The application for certiorari furnishes sufficient data for departmental action. It shows that no specifications of error were filed within the time required, nor at any time.

On the showing made by the petitioner, his appeal, (a copy of which is embodied in his application), would, if before the Department with the record in the case, be dismissed under rules 88 and 90 of practice, for want of specifications of error. As no benefit could accrue to him by ordering up the record, his motion for certiorari is denied and the case will stand closed so far as the appeal is concerned.

RESERVATION UNDER EXECUTIVE AUTHORITY.

JOHN CAMPBELL.

The President is vested with general authority in the matter of reserving land for public uses, and land so set apart is not subject to disposition under the public land laws during the existence of such reservation.

Secretary Lamar to Commissioner Sparks, November 11, 1887.

I have considered the appeal of John Campbell from your decision, dated April 2, 1886, refusing his application to purchase under the coal land law (Sec. 2347, R. S.) the S. $\frac{1}{2}$ of SW. $\frac{1}{4}$ and SW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of Sec. 28, T. 21 N., R. 5 E., Olympia, Washington Territory, on the ground that the tract is reserved and set apart by executive order as part of the Muckleshoot Indian Reservation, and is therefore not subject to sale.

Your decision states that this section, with certain others, was, by executive order of April 9, 1874 (supplemental to executive order of January 20, 1857), "withdrawn from sale or other disposition and set apart as the Muckleshoot Indian Reservation, for the exclusive use of the Indians in that locality," and that said order still remains in full force.

Said order, it appears, was made pursuant to a treaty, negotiated December 26, 1854 (10 Stat., 1132), with certain Indians in Washington Territory. The language of the order is as follows:

It is hereby ordered that the following tracts of land in Washington Territory, viz: sections 2 and 12 of township 20 north, range 5 east, and sections 20, 28, and 34 of township 21 north, range 5 east, Willamette Meridian, be withdrawn from sale or other disposition, and set apart as the Muckleshoot Indian Reservation, for the exclusive use of the Indians in that locality, the same being supplemental to the action of the Department approved by the President January 20, 1857.

You held that this operates to reserve the lands mentioned therein from disposition under the coal land laws, and other laws relating to the settlement and sale of the public domain.

From this holding and from the action refusing to allow him to purchase the tract described, Campbell appeals. His appeal and argument are to the effect that the order of the President placing the land in reservation, for the use and occupancy of the Indians as above indicated, was without authority of law; that the authority of the President to reserve by executive order could extend only to lands to be set apart for military uses, or to lands to be withdrawn because actually granted for some purpose. The correctness of this position can not be conceded, nor can the contention thereon be sustained.

The President has on numerous occasions in the history of the government exercised his authority by placing in reservation for public uses portions of the public domain. His power to make reservations has never been denied, either legislatively or judicially. On the contrary, it has time and again been recognized. It constitutes in fact a part of the land law, exists *ex necessitate rei*, as indispensable to the public weal, and in that light, by different laws, has been referred to as an existing undisputed power too well settled to ever be disputed: See various acts of Congress, cited in 1 L. D., 703; see also case of *Grisar v. McDowell* (6 Wall., 363), and opinion of Attorney General, dated July 15, 1881, and reported in 8 C. L. O., 72. In the latter the following language is used:

That the President has the power to reserve from sale and to set apart for public uses such portions of the public domain as are required by the exigencies of the public service to be appropriated to those uses, is too well established to admit of doubt.

Finding that the tract in question was by the executive order herein quoted legally reserved from sale, appellant's application to purchase under the coal land laws must be denied.

Your decision is accordingly affirmed.

MINING CLAIM—PROTEST—ADVERSE CLAIM.

NEW YORK HILL CO. *v.* ROCKY BAR CO.

Conflicting rights set up to defeat an application for patent cannot be recognized in the absence of an alleged surface conflict.

Acting Commissioner Stockslager to register and receiver, Sacramento, California, March 23, 1886.

With register's letter of the 22d of June, 1883, he forwarded what purports to be the "adverse claim" and protest of the New York Hill Gold Mining Company against mineral application No. 1316, filed in your office on the 19th of March 1883, by the Rocky Bar Gold Mining

Company for the Rocky Bar Quartz Mine, Lot 64, in township 15 N., range 8 east, and Lot 115 in township 16 N., range 8 east. With said letter he also forwarded your decision dated May 22, 1883, refusing to treat said papers as an adverse claim, and an appeal therefrom by the attorneys for said New York Hill Gold Mining Company filed June 22, 1883.

In said "adverse claim" it is alleged that the records of this office show that by patent dated January 2, 1873, the United States conveyed to Alonzo Delano, protestants grantor, 2844.5 linear feet of the identical lode designated in the application of said Rocky Bar Gold Mining Company; that the claims of said last named company were located long ago, at a time when the local laws limited the claim to whatever portion of the vein or deposit was included within the exterior boundary of said claim, commonly known as "square claims", and that said locations gave no right to follow any vein or deposit in any direction outside of the exterior boundary lines of said location, and that the dips and angles of said New York Hill ledge had, before May 10, 1872, been located and claimed in pursuance of the local laws. It is admitted in this paper, however, that applicant—the Rocky Bar Gold Mining Company—is entitled to all that portion of any vein included within its exterior boundaries extended downwards vertically, but that it is not entitled as against any claimant locating and claiming previous to May 10, 1872, to follow any vein or veins discovered within its exterior boundaries "any further downward than where its exterior boundary lines if carried downward vertically would intersect it"; and it is contended that said New York Hill Gold Mining Company would be injuriously affected by granting patent in the usual form upon said application of the Rocky Bar Gold Mining Company.

You declined to treat the paper filed as an "adverse claim" because, as you say, it is admitted by the contestants that the Rocky Bar Gold Mining Company have good and valid claim to the whole surface ground embraced within their application and are entitled to a patent for the same."

The patent for the adjoining claim—the New York Hill Quartz Mine—being mineral entry No. 89—was issued to Alonzo Delano, on the 2d of January, 1873.

I do not think that the rights of the grantees under said patent can be injuriously affected by the pending application of said Rocky Bar Gold Mining Company, based as alleged upon said old locations, and if no adverse claim thereto existed, on the 10th of May, 1872, then subject to the conditions and provisions of Section 2322, Revised Statutes, applicant may have the exclusive right of possession of all veins and ledges throughout their entire depth the top or apex of which lies inside of the surface lines of said claim extended downward vertically, "although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side

lines of such surface locations." In the event that patent should be issued upon said application and any question should thereafter arise as to the right under such patent to follow any vein or lode, as indicated in said Section 2322, it would be a matter for the courts to settle, and I am of the opinion, there being no surface conflict alleged in this case, and without considering any other question relating to the sufficiency of the so called adverse claim, that you properly declined to receive the same as an adverse claim, and to that extent your decision is affirmed. See decision of Secretary Delano in Chollar Potosi and Bullion *v.* Julia (C. M. L., 93); Saratoga *v.* Bulldozer mining claim (S. M. D., 252).

In order that final action may be taken in the matter you will promptly report any and all action taken by said New York Hill Gold Mining Company in the matter of its said so called adverse claim since your decision therein.

You will also make full report to this office showing why said Rocky Bar Gold Mining Company was allowed to make entry on the 30th of August, 1884, of its said claim while the question presented in the appeal herein considered was then undecided and pending before this office.

As said entry No. 994 has not yet been reached in regular order no examination of the evidence therein has yet been made.

You will give due notice of this decision to all parties in interest and make prompt report to this office.

NOTE.—The above decision was affirmed by Acting Secretary Muldrow, November 18, 1887.

MINING CLAIM—PUBLICATION OF NOTICE—WITHDRAWAL OF PROTEST.

AMERICAN FLAG LODE.

The publication is not sufficient if the notice does not appear in every copy of the paper of each issue for the statutory period.

The withdrawal of a protest will not prevent action on the matters alleged therein, if it appears that the applicant has in fact failed to comply with the law.

Acting Commissioner Stockslager to register and receiver, Las Cruces, New Mexico, April 8, 1887.

I have examined the papers in the case of mineral entry No. 147, made February 14, 1884, by William D. Nourse, *et al* upon the American Flag Lode Claim. Accompanying the papers in said entry is found a protest by one Ralph Rockwell against the American Flag application and entry. Mr. Rockwell claims ownership of said American Flag claim under a location of the Silver Cup claim.

The main allegation in said protest is that the publication of the American Flag application for patent was not made in the issue of the "Black Range" newspaper of August 24th, 1883, which date is stated in the publishers affidavit as the first day of the publication.

The publishers affidavit is to the effect that the notice was published from August 24th, 1883, to and including October 26th, 1883, covering the whole period of the sixty days required by the law.

The protestant submits a copy of the "Black Range," which is a weekly newspaper bearing date of August 24, 1883, in which the notice of application for patent for the American Flag claim does not appear. With other evidence submitted by the attorney for the applicants for patent, is an affidavit by Vincent Becket the publisher of said newspaper in explanation and with it he presents a copy of his paper bearing date of August 24th, 1883, in which the notice of the application of the American Flag claim *does* appear. Mr. Becket in his said affidavit, after giving certain reasons for the proceeding, states that a number of copies of his paper, bearing the date in question were printed for his village subscribers and did not contain the notice referred to, but that the remainder and the larger number of the papers of the issue of that day contained the said notice.

I do not think the publication good. I do not see why village subscribers to a newspaper are not as much entitled to read public land notices as other readers or why they may not be as much interested therein. To make it a legal notice it should have appeared in *every* copy of the paper of each issue for the legal period.

I therefore hold that the claimants must cause a new publication of their application for patent to be made. Such new publication must include posting on the claim, and in your office as well as the printed notice in the newspaper, in the manner and for the period prescribed by the law, during which time persons having adverse interests may file their adverse claims as provided by the statute. Pending receipt of evidence of such publication said entry will remain suspended.

Notify all parties in interest allow the usual time for appeal, and thereafter promptly report to this office.

If within the time allowed, no appeal from this decision is filed in this office, nor with you, nor any attempt made to comply with the holding herein as to the new publication, and you so report said entry No. 147 American Flag claim will be canceled.

The applicants' attorney has submitted a copy of a deed, an abstract of title, and other papers showing that the protestant Rockwell has parted with all interest he had, to C. A. Reed and that said Reed as assignee of Rockwell now withdraws the said protest.

The non-compliance with law in the matter of the application for patent having been alleged in the protest filed and substantiated, the withdrawal of said protest cannot affect the action of this office on the facts as found.

NOTE.—The foregoing decision was affirmed by Acting Secretary Muldrow, November 21, 1887.

RAILROAD GRANT—SUIT TO VACATE PATENT.

LINK *v.* UNION PAC. R. R. CO.*

The unlawful occupancy of public land by a willful trespasser, existing when the grant becomes effective, does not serve to except the land covered thereby from the operation of the grant.

The construction and operation of a railroad is sufficient to put subsequent settlers within the limits of the grant on inquiry as to the rights of the road, and parties claiming adversely thereto.

An application for suit to set aside patent, resting on a questionable pretense of title, and devoid of equity will not be entertained.

Acting Secretary Muldrow to Commissioner Sparks, January 31, 1887.

I am in receipt of your letter of January 14, 1887, and accompanying documents, relating to the application of Cecilia F. Link that proceedings be instituted to secure the cancellation of the patent heretofore issued to the Union Pacific Railroad Company, for the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 35, T. 16 N., R. 73 W., Cheyenne land district, Wyoming Territory.

In your said letter you recommend that the Attorney General be requested to institute proper proceedings to secure the cancellation of said patent, on the ground that at the time the railroad was definitely located the tract in question although within the limits of the Congressional land grant to said road, was excepted from the operation thereof, because at that time in the occupation of one Hilton, who had settled upon and improved the same, and who subsequently sold his improvements and possessory right to the husband (since deceased) of Mrs. Link.

If this statement were true your conclusion would be correct, and I would concur with you in recommending the institution of proceedings to secure the cancellation of said patent as having been improperly issued. The testimony accompanying your letter not only does not substantiate the statement, but contradicts it.

The grant in question was originally made to the road by the act of July 1, 1862 (12 Stat., 489), which excepted from its operation lands to which a pre-emption or homestead claim had attached "at the time the line of said road is definitely located." This grant was amended, extended and enlarged by the act of July 2, 1864 (13 Stat., 356), which, however, declared that "any lands granted by this act or the act to which this is a supplement shall not defeat or impair any pre-emption, homestead, swamp land, or other lawful claim."

The map of definite location of the Union Pacific Railroad opposite the tract in question was filed and accepted by the Secretary of the Interior January 5, 1868, and the constructed road accepted by the President May 16, 1868, and said tract, being within the granted limits of said road, and no claim to it appearing of record, was patented to the company on January 5, 1875.

Mrs. Link in her affidavit states that she and her husband, an honorably discharged soldier, with their children, came to Laramie City in

* Omitted from Volume 5.

1870-'71, and in July of the same year purchased of one William N. Hilton, who was then occupying the tract in question, the possessory right to and improvements on the same, paying the sum of \$300 therefor. She further states that said Hilton "previously bought his claim from a party who had located by building a cabin and occupying the same in the fall of 1867." She does not say, nor does it appear anywhere, that Hilton was occupying the land or improving it "in the fall of 1867," as stated in your letter. It is neither alleged nor shown at what time Hilton purchased the improvements or settled upon the land, further than it is shown that he did not settle thereon during the year 1867, as appears by the affidavits of two old citizens, filed by Mrs. Link to sustain her claim.

Michael Carroll, one of these affiants, states that he knows the land well.

I remember this place (claimed by Mrs. Link), in the fall of 1867, and remember a log cabin being built there that fall and parties were living there during the winter of 1867 & 8.

The men who lived there were employed in the wood business. I also remember that Mrs. Link's husband, now deceased, lived there in the spring of 1871, and she has lived there ever since that time to the present.

Lansing T. Wright, the other affiant, states that he knows the land well and says also—

I remember this place (claimed by Mrs. Link) in the fall of 1867, and remember that a log cabin was standing there at that time, and some parties were living there, who were engaged in hauling wood and occupied in the wood business, during the fall and winter of 1867. That Mrs. Link is now living on the land, and has been living there for many years.

It thus appears that Mrs. Link bases her claim upon the settlement of the vendor to Hilton, the former being it is claimed in the occupancy of the land prior to and at the time the definite location of the line of the road on January 5, 1868. But she does not state who that settler was, and could have no personal knowledge of his settlement and occupancy at that time, inasmuch as she did not come into the Territory until 1871. But the testimony of Carroll and Wright show who that settler was, and show conclusively that he was a mere trespasser, who had gone upon the land, and was occupying the same, not for the purpose of claiming it under either the homestead or pre-emption laws, or making other "lawful claim" thereto, but for the illegal and criminal purpose of committing timber depredations thereon. And the same testimony shows that this unlawful occupation of the premises continued not only during "the fall and winter" of the year 1867, as testified to by both witnesses, but, in the language of the witness Carroll, "during the winter of 1867 & 8;" and consequently must have extended beyond January 5, 1868, when the rights of the company attached by the filing of the map of definite location.

Such unlawful occupation as is shown here can not be recognized as the basis for the subsequent bona fide settlement of Hilton and Link.

The land in controversy is situated about two miles north of the City of Laramie, and about the same distance east of the line of the railroad, and is said to possess valuable springs of water, from which the city and company both draw supplies, and is commonly known as "The Springs." Mrs. Link claims that her husband, in his lifetime, and she since his death in 1877, both acted in entire good faith, and endeavored in every way to obtain title to said tract under the public land laws. She states that after the survey of the land in 1874 her husband made an effort to file a declaratory statement for the tract, and also sought to purchase it from the company, but failed in both efforts, for some reason not stated; that in 1878 she made an effort also to file a declaratory statement on the tract, and that the register of the land office received her declaratory statement and fee of \$3, but neglected to make any record thereof. This last statement is apparently true. But conceding the truth of all that is said and claimed, I do not see that the rights of the company can be prejudiced thereby. The constructed road opposite to and probably within plain sight of said tract had been accepted by the President May 16, 1868, and the road was in full operation when in 1871 Link purchased the improvements and entered upon the premises in controversy. Surely these circumstances were such as to have put him upon careful inquiry as to the rights of the road and of his vendor, and no plea of ignorance in the premises can be tolerated, even if any right could be acquired thereby. Under such a state of facts the bona fides of Link may well be questioned, and the present application considered as an attempt to use the government for the purpose of obtaining title to land under a most shadowy and questionable pretense of title, devoid of any equities whatever.

There are other considerations which suggest themselves and would furnish additional reasons for refusing the present application; but deeming these sufficient, I decline to concur in your recommendation in said matter.

HOMESTEAD—COMMUTATION—RESIDENCE.

KILLIN *v.* SUYDAM.

Where an application to commute has been rejected by the local officers and General Land Office, but allowed by the Department, the original entry may, at the option of the claimant, remain intact, or be commuted to cash entry on the evidence submitted.

Absence from the land, though covering a considerable time, will not be held to constitute abandonment, or defeat the right of commutation, when followed by a bona fide continuous inhabitation for the period required in case of commutation.

Acting Secretary Muldrow to Commissioner Sparks, November 15, 1887.

In the case of James P. Killin *v.* John H. Suydam, which comes here on appeal by Suydam from the decision of your office, dated March 2, 1886, the following are the material facts as found by the Department.

On November 12, 1883, Killin filed his soldier's declaratory statement on the SE. $\frac{1}{4}$ of Sec. 2, T. 122, R. 68, Aberdeen, Dakota, land district. Two days afterwards Suydam, who claims to have settled on said tract the latter part of October, 1883, entered the same as a homestead. On May 10, 1884, Killin made homestead entry thereon. Suydam gave general notice, with special notice to Killin, that he would on October 15, 1884, make final proof before the register and receiver in support of his claim. On that day Killin appeared as protestant, and testimony was submitted by each of the parties. On March 18, 1885, the local officers decided that Suydam's settlement was not made in good faith and that his entry should be canceled. This decision was sustained by the decision of your office, and Suydam's entry held for cancellation.

It appears that the land in controversy was not subject to entry till October 2, 1883.

The facts touching the question of appellant's good faith, as found by the Department from the testimony in the case, are as follows: During the summer of 1883 the appellant lived on the northwest quarter of section one, cornering on the land in controversy, on which tract he had broken twenty-eight acres and built a good, comfortable house, worth four or five hundred dollars. On October 2, 1883—the day the township plat was filed—he made a timber-culture entry on the said NW. $\frac{1}{4}$. During the same summer, appellant's son, Ira Suydam, "squatted," as he says, on the land in controversy, and on October 18, 1883, in consideration of \$225, surrendered his possession and sold his improvements on said tract, consisting of a shanty, eight by sixteen feet, and a quarter of an acre of breaking, amounting in value to about thirty dollars, to his father. A preponderance of the evidence shows that appellant's household effects were moved into said shanty on the twenty-third of the same month, and that he ate and slept there till the 12th day of the following November, in the meantime having made some improvements to the shanty by way of sodding it up. He then left the land and did not return to it till April 7, 1884. He says he went east, because of sickness and death, and to visit friends. From April 7 to October 15, 1884, appellant resided continuously on said tract. His improvements consist of a shanty, eight by sixteen feet, with a partition through the same and a cellar under part, a well, a stable and granary combined, twenty-five acres broken, a garden, and fifteen acres cultivated—total value \$130. His family at one time consisted of a wife and two children, the youngest of whom is now twenty-nine years of age. He has been living on the land alone. On cross-examination, he says, that he has no wife, that he is what is called a grass-widower, and on re-direct he says that he and his wife, "if you call her wife," have lived separate for three years, and that she is married.

I can discover nothing in the foregoing facts to justify the finding that the appellant's settlement on said tract was not made in good faith. There has been no direct attempt made to impeach the truth and verac-

ity of the appellant, nor do the established facts indirectly impeach his truthfulness. Therefore when he satisfactorily shows that at and before the time Killin filed his declaratory statement he had improvements on the land in controversy which plainly indicated a settlement claim, and gave fair warning and notice to the world of such claim; that he had actually been living, eating and sleeping for some three weeks just prior to said filing on said land, and supplements these facts by a solemn statement under oath that, at the time he was so living on the land, he settled and established his residence there with the intention of making it his home, I feel constrained, in weighing testimony, to give full credit to such statement.

I find from the evidence that Suydam established his residence on said tract before Killin filed his declaratory statement thereon. Suydam's absence from the tract from November 12, 1883, till April 7, 1884, followed as it was by a continuous residence thereon from the latter date to the date he made final proof was not an abandonment of the land, nor did he thereby lose his residence. He was therefore in a proper condition on October 15, 1884, to make final proof and have his homestead entry commuted to cash entry, and the testimony is found sufficient to warrant such commutation.

Suydam's homestead entry not having been yet commuted he will be allowed, on the evidence now in, sixty days from receipt of notice of this decision within which to exercise his option of commuting the same to a cash entry or of leaving it intact. Killin's entry being in conflict with Suydam's will be canceled.

The decision of your office is therefore reversed.

RAILROAD GRANT—CONFLICTING CLAIM.

ST. PAUL M. & M. RY. CO. v. QVAMME.

The grant of four additional sections by the act of March 3, 1865, was not a grant of quantity, but of lands in place.

Land covered by a pre-emption claim at the date when the grant became effective is excepted therefrom, though on final proof the pre-emptor abandoned so much of his claim as embraced the tract in question.

Acting Secretary Muldrow to Acting Commissioner Stockslager, November 18, 1887.

I have considered the case of the Saint Paul, Minneapolis and Manitoba Railway Company (formerly Saint Paul and Pacific, Saint Vincent Extension,) *v. Rognald H. Qvamme*, as presented by the appeal of the latter from the decision of your office, dated September 3, 1885, affirming the action of the local land officers, rejecting his application to file a pre-emption declaratory statement for the lots 3 and 7 of Sec. 25, T. 136 N., R. 44 W., alleging settlement thereon July 17, 1884.

The decision of your office states that "the tracts are more than six and less than ten miles from the line of railway mentioned, and within the thirty mile limits of the grant to the Northern Pacific Railroad Company."

On December 13, 1870, Andrew Johnson filed his pre-emption declaratory statement, No. 426, for lots 2, 3 and 7 of Sec. 25, and the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 26 of said township and range, and on October 2, 1873, made cash entry No. 1664 of said lot 2, Sec. 25, and the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, and the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 26.

It appears that a withdrawal for the benefit of the Saint Vincent Extension Company was ordered by your office on February 6, and the same was received at the local land office on February 15, 1872. The tracts in dispute were selected by the St. Paul, Minneapolis and Manitoba Railway Company on November 24, 1883.

Your office decision holds that at the date of said selection, said lands were subject to selection and entry by the first legal applicant, and that since said selection had been made, the application to make said filing must be rejected, upon the authority of the decision of the United States supreme court in the case of the Saint Paul Railroad *v.* Winona Railroad (112 U. S., 720).

The status of the lands within the six and ten miles limits of said grant was considered by this Department in the case of Greenhalgh *v.* St. Paul, Minneapolis and Manitoba Ry. Co. (5 L. D., 565), wherein it was held, upon the authority of the decision of the supreme court in the case of Barney *v.* Winona and St. Peter Railroad Company (117 U. S., 228), that "the grant of the four additional sections by the act of 1865 was also a grant of land in place." This decision of the supreme court discarded the statement in the same case reported in 113 U. S., 618, that "the four sections are to be selected by the Secretary of the Interior beyond the six and within the twenty mile limits, and as to them the grant may be regarded as one of quantity, though the coterminous principle applies to them, and they are to be selected along and opposite the completed road."

It was also held that the statement that the additional grant was one of quantity was an inadvertence, for which the writer of the opinion was alone responsible.

It follows, therefore, that said land being embraced within said pre-emption claim, at the date of the definite location of the road, was excepted from said grant, and the selection of said tracts within said granted limits gave the company no right to the land, since it was not granted. *Nyman v. St. Paul, Minneapolis & Manitoba Ry. Co.* (5 L. D., 396.)

Said selection being invalid must be canceled, and upon the cancellation thereof, said filing should be allowed, to date from the cancellation of said selection.

The decision of your office adverse to the claim of the Northern Pacific Company has become final for want of appeal. Said decision is accordingly reversed.

INDEMNITY WITHDRAWALS—RULE OF MAY 23, 1887.

The order revoking indemnity withdrawals was not intended to affect rights of grantees within the primary limits of other Congressional grants, or rights acquired under certain other indemnity withdrawals, the status of which has not yet been determined.

Secretary Lamar to Acting Commissioner Stockslager, November 19, 1887.

I am in receipt of a letter from Messrs Curtis and Burdett of this City, inclosing one from you to them, dated November 5, 1887.

It is alleged by Messrs Curtis and Burdett that in carrying out the directions of this Department relative to the restoration of lands heretofore withdrawn for indemnity purposes under the grant to the Northern Pacific Railroad Company, the register at Fergus Falls has published a list of the lands to be so restored, which list embraces lands within the lapping or conflicting limits of the Northern Pacific and the St. Paul Minneapolis and Manitoba Railway Company.

Your attention having been called to this action of the register, you disclaimed official knowledge of the same; and further the departmental order in relation to the Northern Pacific Company was quoted as showing that all lands within the indemnity limits of said road were to be restored. "Provided the restoration shall not affect the rights acquired by grantees within the *primary* limits of any other Congressional grant", and you show that orders were issued in exact conformity with this direction.

The departmental order though worded as stated, was not intended to affect the claims of other grantee companies which, like those of the St. Paul, Minneapolis and Manitoba Company, had not been passed upon by this Department.

You will therefore please instruct the officers at the different land offices that none of the orders of restoration of lands in indemnity limits of other roads were intended to interfere with or affect rights acquired by grantees within the primary limits of any other Congressional grant, or rights acquired under withdrawals made for indemnity purposes under grants to the Hastings and Dakota Railway Company, the St. Paul and Northern Pacific Railway Company, the St. Paul, Minneapolis and Manitoba Railway Company, the St. Paul and Sioux City Railroad Company, the Sioux City and St. Paul Railroad Company, and the Winona and St. Peter Railroad Company: the rights of which companies under their indemnity withdrawals have not been definitely determined by me.

TIMBER CULTURE CONTEST—AMENDMENT OF ENTRY.

SMOTEL *v.* MONROE.

An entry not made in the real name of the claimant must be amended to show the true name of the entryman.

Acting Secretary Muldrow to Acting Commissioner Stockslager, November 17, 1887.

James Monroe made timber culture entry July 1, 1878, upon the SE. $\frac{1}{4}$ of Sec. 6, T. 103 N., R. 44 W., Worthington, Minnesota. John Smotel filed affidavit of contest January 30, 1885, alleging that the claimant "has not complied with the requirements of law relating to timber culture entries, not having the number of trees required on said entry and not the number of acres required. Also having failed to cultivate the same for the past season. After hearing duly held March 23, 1885, the local officers dismissed the contest. Your decision of December 18, 1885, reversed the action below and contestee appealed.

From the testimony submitted on behalf of contestant, it appears that eight and a half acres were broken prior to 1884; that about the time of hearing only 986 trees could be counted, and that nothing was done upon the land after July, 1883.

The claimant testified that he set out 33,000 trees in the spring of 1883; that he planted one half a bushel of soft maple seed in the spring of 1884, and that between July, 1883, and July, 1884, he planted with seeds a piece 158 rods long, with an average width of thirty-two paces of three feet. Further testimony was submitted tending to corroborate that of claimant and to the effect that there is fully ten acres of breaking on the tract, that "upwards of half of the trees planted are now growing, and are from six inches to six feet high."

It was further shown that the claimant's real name is James Monroe Tatman, although the entry was made in the name of James Monroe.

The burden of proof being upon the contestant, I am of the opinion that the record does not disclose sufficient reason for disturbing the entry. The contest should be dismissed.

Your decision in this regard is accordingly reversed. The claimant's entry, however, should not be allowed to stand in the name of James Monroe. It should be amended so as to stand in the real name of the claimant.

*PRACTICE—FILING—ENTRY—FINAL PROOF.***AUSTIN v. THOMAS.**

When a pre-emptor applies to file for land covered by the entry of another, alleging settlement before said entry, a hearing should be ordered to determine priorities. No rights as against the government can be acquired by settlement on land embraced within an existing entry; but the circumstances attending the filings and settlements of contesting parties, for land covered by such an entry, may be properly considered in determining the equities of the parties.

An entryman who sets up his superiority of right, as disclosed of record, to defeat the adverse claim of another, must submit to an order of cancellation if the evidence shows he has failed to comply with the law.

The finding of the local officers, with the witnesses before them, is entitled to special consideration in case of conflicting testimony.

On premature submission of final proof, new proof will be required.

Acting Secretary Muldrow to Acting Commissioner Stockslager, November 18, 1887.

I have considered the case of Freeman W. Austin v. James Thomas, as presented by the appeal of the former from the decision of your office, dated January 20, 1886, rejecting his pre-emption proof, and holding for cancellation his declaratory statement for the SW. $\frac{1}{4}$ of Sec. 20, T. 14 N., R. 7 E., filed February 7, 1883, at the Sacramento land office, California, alleging settlement thereon December 26, 1882, and awarding said tract to Thomas.

The record shows that the amended township plat of survey was filed in the local land office on February 19, 1881; that September 14, same year, one George Small made homestead entry of said tract, which was canceled on his relinquishment on February 5, 1883; that said Thomas on December 21, 1882, filed his affidavit of contest against said entry, and hearing was ordered to be had on the 6th day of February following; that on February 6, 1883, said Thomas made homestead entry of said tract; that said Austin, on July 18, 1883, gave notice of his intention to make final proof and payment for said land before the local land officers September 4th following. Hearing was had before the local land officers on said last named date, to determine the rights of the respective parties. From the evidence submitted, the register and receiver found that both parties were duly qualified; that Austin, in the month of October, straightened up a cabin on said land with the intention of establishing his residence therein; that said cabin was the property of said Small, and was purchased from him by Austin on January 25, 1883; that said Austin was unable to establish his actual residence on said tract, by reason of an injury to his foot, until after December 25, 1882, when he repaired said cabin and built an addition thereto; that from the last of December, 1882, the residence of Austin on said land was continuous; that his improvements consist of said cabin, a chicken house, one half mile of fence on the north side, purchased from Small,

one half mile of fence on the east side built in 1884, a garden spot under fence, a field of twelve or fourteen acres enclosed, four acres plowed and sowed to barley, oats and wheat, forty fruit trees and fifty-one grape vines—all valued at three hundred dollars; that at the date of Austin's alleged residence, there were no improvements on said tract, except said cabin and said fence, which he purchased from said Small in the month following; that said Thomas commenced to build his cabin on March 5, 1883, and moved into the same on the next day; that his improvements consisted of his cabin, ten by twelve feet, about three-fourths of an acre, summer fallowed, and sown to barley in the fall of 1883, about ten acres enclosed with a brush fence, six or seven acres of which were plowed; that the evidence as to the residence of said Thomas on said tract was very conflicting; that the testimony of Thomas, corroborated by three witnesses, tends to show that the land was his only home, and that, except when he was working around, which was most of the time, he resided in his cabin on said land; that it was the custom of said Thomas, when out at work, to return to his cabin on Saturday evening and remain until the following Sunday evening; that the testimony of Austin and his four witnesses tends to show that Thomas did not live in his cabin at all, and that his residence on said tract was a mere pretence.

The register and receiver held that, from all of the circumstances as disclosed by the record, Thomas had failed to maintain a residence as required by law, and that said Austin had the superior claim, by reason of his residence, cultivation and improvement of said tract, and that he should be allowed to enter said land.

Your office, however, on appeal, reversed the action of the local land officers, as above stated, upon the ground that the homestead entry of Small segregated said tract, and, so long as the same remained of record, no pre-emptive right could be initiated; that the settlement of Austin on December 26, 1882, gave him no legal status at that time; that by the initiation of his contest against Small's entry, Thomas acquired a preference right of entry, which he exercised four days after the cancellation of said entry; that, while Thomas's said entry remained intact, Austin could acquire no valid right to said land; that the proof of Austin must be rejected and his filing held for cancellation.

The record shows several errors. Austin's filing should not have been allowed until a hearing had determined the rights of the respective parties. *James et al. v. Nolan* (5 L. D., 526).

While it is true that Austin could acquire no rights as against the United States by settling upon land covered by an existing entry, yet the circumstances attending the settlements and filings of contesting parties for land covered by an existing entry may be considered in determining the equities of the claimants. *Geer v. Farrington* (4 L. D., 410); *Gudmundson v. Morgan* (5 L. D., 147).

That Thomas acquired a preference right of entry of said tract by the initiation of said contest must be conceded. But the record shows that he exercised that right, and, if the findings of the local land office be correct, he has forfeited said entry by his failure to comply with the law. *Rue v. Fairbault et al.* (5 L. D., 260.)

The local land officers, with the witnesses before them, have found the preponderance of the evidence, which is conflicting, to be in favor of the pre-emption claimant, and their judgment thereon is entitled to special consideration. *Morfev v. Barrows* (4 L. D., 135).

A careful consideration of the evidence leads me to the conclusion that the findings of the register and receiver as to residence were correct, and that the homestead entry should be canceled. While it is true that the homestead entry of Thomas should be canceled, it is apparent that the notice of final proof was prematurely made. The pre-emption claimant will be allowed to make new proof within a reasonable time after notice of this decision showing compliance with the requirements of the pre-emption law.

The decision of your office is modified accordingly.

HOMESTEAD ENTRY—"TRADE AND BUSINESS."

FONTS v. THOMPSON.

One who occupies, and is making use of public land for business purposes, prior to the entry thereof, is precluded from appropriating such land under the homestead law, which excludes from entry thereunder land "actually settled and occupied for the purpose of trade and business."

Acting Secretary Muldrow to Acting Commissioner Stockslager, November 22, 1887.

James C. Thompson filed pre-emption declaratory statement June 28, 1880, alleging settlement March 29, 1874, upon the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 5, and the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 8, T. 17 N., R. 7 W., M. D. M., San Francisco, California.

July 7, 1880, John F. Fonts made homestead entry for the same land.

After due notice Thompson submitted final proof at the local office May 8, 1883, to which Fonts objected and submitted testimony.

The local officers rejected Thompson's proof and sustained the claim of Fonts. Your decision of November 12, 1885, holds the filing of Thompson and the entry of Fonts for cancellation. The case is here on appeal by both parties.

The record shows the land to be of inferior quality, its chief value consisting of certain mineral springs thereon; that Thompson being aware of said springs, at some time prior to December, 1873, made a verbal agreement with Fonts regarding which there is conflict of evidence, but which appears substantially to have been that Fonts was to

build a hotel and improve the land. Thompson (being a carpenter) to work thereon, such work to apply against Fonts' capital, Fonts to manage the business until he recovered half (or all) the money so invested, at which time the property was to belong to them jointly.

In the latter part of 1873, or the spring of 1874, Thompson with one Vaughn, who seems to have represented Fonts, went on the land and built a brush cabin, Fonts supplying them with "grub" while there. In May 1874, Fonts began to improve the tract, putting up in that year a hotel and other buildings, and continuing until at the time of hearing. May, 1883, he had twenty cottages, hotel, bath house, store, etc., costing some \$10,000.

Thompson's residence upon the land appears from the contradictory testimony, to have been uncertain. He remained upon the land a short time after Fonts began said improvements. He then appears to have visited the springs from time to time, on which occasions he lived in one of Fonts' cottages until 1877 when he set out some grape vines and built a cabin which he occupied occasionally until October, 1881, when he had a quarrel with Fonts who (with a rifle) ordered him from the premises.

Considerable testimony was introduced to show that Thompson was a person without fixed abode, and that he was regarded in the community as a "bummer," and also that his principal abiding place was in "Sullivan Valley" where he claimed some land. It was contended on behalf of Fonts that Thompson had exhausted his pre-emption rights, and a certain declaratory statement filed in the local office by one J. C. Thompson in May, 1876, whose signature strongly resembles that of the pre-emption claimant was put in evidence. The record further shows that Thompson filed on March 30, 1878, under provisions of the act of the Legislature of California approved April 20, 1852, (Laws of California, 1850-3, p. 896), a possessory claim for the land in controversy.

Fonts appears to have resided upon the land continuously since 1877, prior to which time he spent the winters at the town of Meridian (his former residence), living upon the land during the spring and summer. He also cultivated some three or four acres.

Aside from the question raised by the fact that the agreement or contract between the parties for the transfer of the land to be acquired is void, the failure of Thompson to comply with the pre-emption law is clearly shown by the evidence, and I therefore sustain your action rejecting his proof and holding his filing for cancellation.

It appearing from the record, that Fonts, since 1874, has made use of the land for the purpose of maintaining a health resort thereon, I am of the opinion that the tract in question at the date of his said homestead entry, was "actually settled and occupied for the purpose of trade and business" within the meaning of section 2253, Revised Statutes, which provides that land so occupied shall not be subject to pre-emption.

I therefore concur in your conclusion that said homestead entry of Fonts upon land not subject to pre-emption, should be held for cancellation.

Your decision is affirmed.

REPAYMENT—VOLUNTARY RELINQUISHMENT.

JEAN ECKLES.

The right of repayment should not be denied on the ground that the applicant voluntarily relinquished his claim, where such relinquishment was filed in accordance with a decision of the General Land Office holding that the government could not give title to the land entered, and accepting the relinquishment "without prejudice."

Acting Secretary Muldrow to Acting Commissioner Stockslager, November 23, 1887.

I have before me the appeal of Jean Eckles, from your decision of April 29, 1886, denying her application for re-payment of the purchase money paid by her upon desert land entry for the E. $\frac{1}{2}$ of NW. $\frac{1}{4}$, and NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$, and SE. $\frac{1}{4}$ of SW. $\frac{1}{4}$, and W. $\frac{1}{2}$ of NE. $\frac{1}{4}$, and SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of Sec. 9; and SW. $\frac{1}{4}$ of NW. $\frac{1}{4}$, and the SW. $\frac{1}{4}$ of Sec. 10, T. 20 N., R. 5 W., Helena district, Montana.

The record shows, that under date of March 27, 1884, Eckles applied for permission to relinquish her said entry without prejudice, "for the reason that there were prior valid filings on said land of which she was ignorant at the time of making said entry; viz., declaratory statements Nos. 3861, 3872 and 3911, made in March and May 1880, declaratory statements Nos. 4220 and 4221, made in July 1881; the latter transmuted into homestead entry No. 2414 March 17, 1884, for SE. $\frac{1}{4}$ NE. $\frac{1}{4}$ of Sec. 10, said township, by Hinrich Allgardt."

Upon this application, your predecessor, Acting Commissioner Harrison, made the following decision:

Under the circumstances, the government being unable to give her title to the land entered, she will be allowed to relinquish the same without prejudice to her rights under the desert land act.

The applicant relinquished accordingly, and with her relinquishment filed the application for repayment which you denied.

The relinquishment having thus been filed by the express permission of your office, and upon a formal decision by the latter that the case was one in which a relinquishment "without prejudice" ought to be allowed, "the government being unable to give title to the land entered," I do not think that your office can now properly treat the relinquishment as a purely "voluntary" one or re-open the question as to the entry's having been one which "could not be confirmed."

Your decision is accordingly reversed.

PRACTICE—NOTICE—PUBLICATION—ATTORNEY.

PORTER v. WHITE.

No jurisdiction is acquired by the local office if the notice is not served in accordance with the rules of practice, or, in the absence of a proper basis for an order of publication.

The notice of a decision to which the attorney of a party is entitled, is not susceptible of service by publication.

Rehearing on the plea of insufficient notice, and want of authority on the part of the attorney who entered appearance, denied in view of the subsequent employment of said attorney, and the fact that the motion in itself discloses sufficient ground for cancelling the entry in question.

Acting Secretary Muldrow to Acting Commissioner Stockslager, November 23, 1887.

I have considered the case of John Porter v. John J. White as presented by the appeal of the latter from the decision of your office, dated September 16, and October 15, 1885, canceling his homestead entry No. 18,134, of the SW. $\frac{1}{4}$ of Sec. 28, T. 105 N., R. 60 W., made March 7, 1882, at the Mitchell land office in the Territory of Dakota.

The record shows that said Porter on May 24, 1883, filed in the local land office his affidavit of contest against said entry, alleging abandonment, change of residence, and failure to settle and cultivate as required by law. Said affidavit contains the following allegation :

Affiant having made diligent inquiry in the vicinity of the tract involved, verily believes that the claimant herein is not a resident of Dakota Territory, and that personal service can not be made upon him, and asks that service may in this case be made by publication.

Publication of notice was made, and August 3, 1883, was set for the hearing.

On the 17th of July same year, the contestant mailed by registered letter a copy of said notice addressed to said White at Oskaloosa, Iowa, which the contestant averred to be the last known address of the claimant, having learned the same after due inquiry. The contestant further avers that on July 1st, he posted a copy of said notice on the land in contest. On August 3, 1883, the day set for the hearing, one H. E. Mayhew, an attorney at law, appeared at the local land office and submitted his ex parte affidavit, alleging that said Mayhew :

Is attorney for above named claimant John J. White, that he was employed in the case only yesterday, that said claimant is absent from the Territory, but is expected to arrive within a week or ten days; that said White never knew of said contest until within the last two days; that said claimant as the affiant believes, has been detained in Minnesota by sickness which made it impossible for him to be present on the day of said hearing; that from conversations had with the claimant the affiant believes that he has acted in good faith in making said entry, and is endeavoring to comply with the requirements of the homestead law; that the claimant's rights would be abridged if forced to trial at that

time, but if a continuance was granted for twenty days, said claimant would be present and prove to the satisfaction of the local land officers that he had endeavored to comply with the requirements of said law.

This affidavit was corroborated by the affidavit of one James Shannon, who also swears that said White did not know of said contest "until so informed by telegraph two days ago." Counter affidavits appear to have been filed, but said hearing was continued until August 23, 1883. On the day last named contestant submitted testimony tending to prove said allegations of contest, and the local land officers adjudged said entry forfeited.

On September 11, 1884, the local land officers transmitted the papers to your office, and reported that due notice of the decision of the register and receiver was given to all parties in interest "by publication."

On November 30, 1883, said Mayhew filed in the local office a motion to dismiss said contest, and in case the same is not dismissed, that a rehearing be granted to determine the rights of the respective parties.

Counsel for contestant admitted "due and sufficient service" of said motion, and the local land officers on the same day, overruled said motion and noted that "the claimant files his exception and gives notice of appeal."

The grounds upon which said motion was based, were:

(1) That the affidavits were not verified before the proper officer; (2) that personal service was not made upon the claimant in accordance with the rules of practice, said claimant being at that time a resident of said territory and his post office address being known to said contestant; (3) that no proper basis was made by affidavit whereby notice by publication could be made, and, (4) that by the direct action of the contestant in intercepting the letters of claimant he was prevented from being present at said trial, and submitting testimony to disprove the allegations of contest.

This motion was supported by ex parte affidavits tending to show that claimant was necessarily absent from said claim; that he did not employ said Mayhew to procure a continuance of the case at said hearing; that the claimant's post office address was known to the contestant and he could have made personal service upon him had he so desired.

The grounds upon which said motion was denied by the local land officers are not stated. On September 5th, the local land officers reported that no appeal had been filed by the claimant in said case, and on September 16th same year, your office canceled said entry.

On September 26th, same year, said Mayhew addressed a letter to your office relative to the cancellation of said entry, stating that the same had been canceled, as if there had been no appearance at the hearing and no subsequent proceedings; that there was no appearance on the part of said White at the trial; that said attorney was afterwards employed by the claimant, and on November 30, 1883, said attorney appeared at the local land office and filed a motion for dismissal of

said contest or a rehearing of the case; that said motion was overruled and an exception and appeal were noted thereon; that said motion was supported by the affidavits of said White and three others, setting forth newly discovered evidence; that said motion and affidavits were attached to the papers in the case, and counsel asked your office, in case said motion and papers had not been received, to suspend the homestead entry of said land made by said contestant until the papers in said motion could be reproduced.

The statements in said letter are duly verified.

On October 16, 1885, your office advised the local land officers that said motion and accompanying affidavits were filed and duly examined; that due notice of hearing was given and "no appearance was made by claimant on the day to which hearing was continued at the request of his counsel"; that notice of said decision was given in the usual manner; that "no appeal was taken, either from your original decision of October 19, 1883, or from your refusal November 30, 1883, to re-open the case upon a motion made more than thirty days after publication of notice of said decision, and not based upon newly discovered evidence, and thirty days subsequent to claimant's return from what he asserts was an excusable and necessary absence of eleven months from the land. Upon such a state of facts the entry was canceled as a *matter of course*."

The appellant insists that your office erred, (1) In not dismissing said contest for irregularities. (2) In holding that no appeal was taken from the decision of the register. (3) In cancelling said entry without allowing claimant time for appeal. (4) In not considering said appeal; and, (5) In not dismissing the case or ordering a rehearing.

Counsel for contestant have submitted with their argument several affidavits tending to contradict the allegations of claimant in his said motion for rehearing. If it be true that there was no proper basis for an order of publication in the case at bar, or the notice was not given as required by the rules, then the local land officers would not have jurisdiction in the premises, unless notice was waived by the appearance of said attorney for claimant. *Vaughn v. Knudson* (2 L. D., 288); *Parker v. Castle* (4 L. D., 84).

Your office finds that the claimant appeared by attorney and asked for continuance of the case. It is denied by the attorney, and by White, that he was so employed by White, and besides, it is averred, that the contestant by fraud prevented the claimant from receiving notice of said hearing and presenting his testimony in support of the validity of his entry. Again your office holds that the attorney for the claimant appeared regularly and asked for a continuance of the case. If that be true, then said attorney was entitled to a notice of said decision of the local land officers, adjudging said entry forfeited, and publication of such notice in a newspaper is not a compliance with the requirements of the Rules of Practice, Nos. 44 and 104. *Ballard v. McKinney* (1 L. D., 477), *Elliott v. Noel* (4 L. D., 73).

But conceding that the notice of publication was improperly issued, and that said attorney may not have been employed by said White to obtain said continuance, yet, in view of the fact that the claimant employed the same attorney soon afterwards to make a motion for a rehearing, and the same witness, James Shannon, who made the corroborative affidavit for continuance, also made his affidavit in support of the motion for a rehearing, and the additional fact that the statements made by the claimant, himself, show that he failed to comply with the requirements of the homestead law, and the excuse offered therefor not being sufficient, I am of the opinion that said entry should be canceled. The conclusion of your office is therefore, correct. Said decision is accordingly affirmed.

HOMESTEAD FINAL PROOF—RESIDENCE.

CHARLES C. BOULTON.

Actual residence having been established, and valuable improvements made, temporary absences thereafter, at a season of the year when but little work, if any, could be done on the land, are not inconsistent with good faith in the matter of residence.

Acting Secretary Muldrow to Commissioner Sparks, September 17, 1887.

I have considered the appeal of Charles C. Boulton from your office decision of February 4, 1886, rejecting his final proof and holding for cancellation his homestead entry for the NE. $\frac{1}{4}$ of Sec. 28, T. 101 N., R. 60 W., 5th P. M., Mitchell, Dakota, land district, Springfield series.

Boulton made his entry April 13, 1880, and offered final proof April 15, 1885, which was accepted by the local office and final certificate issued.

When the papers reached your office, the proof was declared unsatisfactory and the entryman was required to make supplemental affidavit, showing the number of times he had been absent from the claim and the causes therefor. On January 2, 1886, this supplemental affidavit was filed. The proof being still unsatisfactory, you on February 4, 1886, rejected the same and held his entry for cancellation. From this decision the entryman appeals.

Boulton made his entry April 13, 1880, and established residence, as shown by the final proof, in October following, built a sod house at that time, ten by twelve feet. In March, 1881, he built a frame house ten by sixteen feet. In his supplemental affidavit he states the facts more in detail, which are in substance as follows:

In the summer of 1880 he built a sod house, with board roof, placing therein bed and bedding, a stove and a little furniture. During the winter of 1880 and 1881 he lived with his brother about a mile distant, because it was impossible to procure fuel for two places, being blockaded by the heavy snow of that year, and shut up from the outside world for five months. As soon as the roads were passable he obtained sup-

plies, and went to work on his claim, breaking five acres. He also built a frame house, twelve by sixteen feet, eight feet high, with shingle roof, door and window, placing therein bed, bedding, stove and wearing apparel. He made this his home, working on his land and occasionally for his neighbors. During the fall and winter he made his home on the land, except that when working for his neighbors he ate and slept with them. In the spring of 1882 he cultivated the land already broken and broke ten acres more, which he cropped to oats and flax. He also had a fire guard, one rod wide, broken on three sides of his claim. That fall, while teaming, he was severely injured by an accident and went to his brother's, a married man, to be taken care of, remaining there three months. When he was able to work he went to Chamberlain, about seventy-five miles from his claim, and worked until spring, when he returned to his land, cultivated that portion which had previously been plowed and broke ten acres more. This season his crops were destroyed by a hail storm, and the latter part of harvest he was taken sick from the effects of his previous injury, being disabled thereby until December, during which time he was again at his brother's. When able to do so he returned to his claim and lived there some time, but having nothing to do there went to Mitchell, some fifteen miles distant, to work at wagon making, returning to his land and staying over Sundays. In the spring of 1884 he cropped his land to corn, oats and flax, and in the fall again worked in Mitchell, returning to the land Saturday nights. He also states he is unable to give the exact dates at which he went to work and returned to his land, as he kept no track of them.

The facts, as above set forth, show conclusively that Boulton established an actual residence upon said land within the time specified by the rules and regulations governing in such cases, and that he has made permanent and valuable improvements thereon. It is also shown that his absences were temporary in character, and occurred in each instance at a season of the year when but little, if any, work could be done towards improving his claim. I think that all the facts and circumstances in this case show conclusively good faith on the part of the entryman and a substantial compliance with the requirements of the law.

Your said office decision rejecting the final proof in this case and holding the entry for cancellation is therefore reversed.

TIMBER CULTURE ENTRY—EXCESSIVE ACREAGE.

CHARLES W. MILLER.

Two entries in a section allowed to stand, where the amount of land covered thereby was only slightly in excess of one fourth of the section.

Acting Secretary Muldrow to Commissioner Sparks, September 19, 1887.

I have considered the ex-parte case of Charles W. Miller, involving his timber culture entry on the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 2, T. 15 N., R.

44 W., Walla Walla, Washington Territory, appealed from the decision of your office, dated February 25, 1886, holding said entry for cancellation.

Miller's entry of the said tract, which contains eighty acres, was made October 12, 1885. It appears that said section contains six hundred and ninety and eighty one-hundredths acres, and that a timber culture entry containing one hundred and one and eighty one-hundredths acres was made therein by one McKinley on August 10, 1885.

You hold "that the act of June 14, 1878, does not allow more than one hundred and sixty acres to be entered thereunder in any one section."

This is not in all cases the correct interpretation of said act, as shown by the departmental decision in the case of Bernard McCabe (4 L. D., 69).

The three entries allowed in the McCabe case though aggregating two hundred and eighty acres did not amount to one-fourth of the section in which they were made, while in this case, if Miller's entry is permitted to stand, the amount of land taken under the said act, will be nine acres in excess of one-fourth of the section. This excess, in the opinion of the Department, is too insignificant to invalidate the entry under consideration, and it will be allowed to remain intact.

The decision of your office is accordingly reversed.

PRE-EMPTION ENTRY—MORTGAGE.

WILLIAM H. RAY.

There is no law, or ruling of the Department now in force, that prohibits a pre-emptor, who has complied with the law in good faith, from mortgaging his claim to procure money for the purpose of making final proof and payment.

Acting Secretary Muldrow to Commissioner Sparks, October 11, 1887.

I have considered the appeal of William H. Ray from the decision of your office, dated June 29, 1886, refusing to allow him to transmute to homestead entry his pre-emption declaratory statement, No. 7566, filed October 19, 1883, at the Olympia land office, in the Territory of Washington, for the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, and the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 22, T. 17, R. 5 W.

The application was refused, for the reason that said Ray made homestead entry No. 3267 of the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, and the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 10, T. 17 N., R. 6 W., on June 4, 1879, which he voluntarily relinquished.

The applicant alleges that he was obliged to abandon his homestead entry, because of lack of school facilities, and also for the reason that parties who promised to take up claims in the vicinity failed to do so.

He further alleges that it will be impossible for him to pay the purchase money for his claim, unless he encumbers the same.

There is no law or ruling of this Department now in force that prohibits a pre-emptor who has complied with the requirements of the pre-emption law in good faith, from mortgaging his claim to procure money to prove up and pay for his land. *Larson v. Weisbecker* (1 L. D., 409).

The decision of your office that, since the applicant has already made one homestead entry of land subject to entry, he can not be allowed to make another, is correct and must be affirmed.

LAND IN THE POSSESSION OF INDIAN OCCUPANTS.

CIRCULAR.

Commissioner Sparks to registers and receivers, and U. S. surveyors-general, October 26, 1887.

Your attention is called to the circular of this Department of May 31, 1884, relative to lands occupied by Indian inhabitants (3 L. D., 371), viz:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 31, 1884.

Registers and Receivers, U. S. Land Offices.

GENTLEMEN: Information having been received from the War Department of attempts of white men to dispossess non-reservation Indians along the Columbia River and other places within the Military Department of the Columbia of the land they have for years occupied and cultivated, and similar information having been received from other sources in reference to other localities where land is occupied by Indians who are making efforts to support themselves by their own labor, you are hereby instructed to peremptorily refuse all entries and filings attempted to be made by others than the Indian occupants upon lands in the possession of Indians who have made improvements of any value whatever thereon.

In order that the homes and improvements of such Indians may be protected, as intended by these instructions, you are directed to ascertain, by whatever means may be at your command, whether any lands in your districts are occupied by Indian inhabitants, and the locality of their possession and improvements as near as may be, and to allow no entries or filings upon any such lands. When the fact of Indian occupancy is denied or doubtful, the proper investigation will be ordered prior to the allowance of adverse claims. Where lands are unsurveyed no appropriation will be allowed within the region of Indian settlements until the surveys have been made and the land occupied by Indians ascertained and defined.

Very respectfully,

N. C. McFARLAND,
Commissioner.

Approved, May 31, 1884:

H. M. TELLER,
Secretary.

The foregoing instructions apply to every land district and to all lands occupied by Indian inhabitants in any part of the public land States and Territories of the United States.

It has been officially represented that these instructions are disregarded, and that public land entries have been allowed upon lands on which Indian inhabitants have their homes and improvements, and in some cases where the Indians have so resided for a number of years, cultivating the soil, and making the land their permanent homes.

The allowance of such entries is a violation of the instructions of this Department, an act of inhumanity to defenseless people, and provocative of violence and disturbance.

You are enjoined and commanded to strictly obey and follow the instructions of the above circular and to permit no entries upon lands in the possession, occupation, and use of Indian inhabitants, or covered by their homes and improvements, and you will exercise every care and precaution to prevent the inadvertent allowance of any such entries. It is presumed that you know or can ascertain the localities of Indian possession and occupancy in your respective districts, and you will make it your duty to do so, and will avail yourselves of all information furnished you by officers of the Indian service.

Surveyors general will instruct their deputies to carefully and fully note all Indian occupations in their returns of surveys hereafter made or reported, and the same must be expressed upon the plats of survey.

Approved: October 27, 1887.

H. L. MULDROW,
Acting Secretary.

CONTEST—PREFERENCE RIGHT OF ENTRY.

BLOSS v. HUNDEMER ET AL.

The right of a successful contestant should not be defeated by a charge of having wilfully attempted to mislead the local officers in a matter affecting their jurisdiction, where such charge was in substance ignored by the local office and the case continued for further service of notice.

Secretary Lamar to Commissioner Sparks, November 14, 1887.

In the case of Milton F. Bloss v. Henry Hundemer, involving the latter's timber culture entry on the NW. $\frac{1}{4}$ Sec. 7 T. 102, R. 61, Dakota, and the former's preference right to enter the same, as against the right set up by Samuel H. Walker to contest said entry the following are the material facts:

Hundemer entered the land June 2, 1879. On August 27, 1881, Walker instituted contest. On October 26, following a hearing was had, at which there was no appearance for the entry man and on the testimony introduced by Walker the local officers decided that the

entry should be canceled. Appeal notice to the entryman was given by publication April 15, 1882. No appeal was taken from the decision of the local officers, and in June following the papers in the case were forwarded to the Commissioner, who, on January 2, 1883, dismissed the contest, on the ground that Walker having failed to make application to enter the land had no right to contest Hundemer's entry, and he instructed the local officers to promptly notify Walker of his decision and to be careful to advise him of his right of appeal to the Department. From this decision no appeal was taken.

On January 11, 1883, Bloss instituted the present contest against said entry and applied to enter the land under the homestead law; and thereupon a hearing was set for March 15, following.

From the contents of a paper found in the case, dated January 31, 1883, it seems that on or about that date Walker, by his attorneys, moved the local officers to dismiss Bloss's contest, on the ground that the affidavit on which it was based was insufficient to sustain a contest; and at the same time asked to be allowed to contest said entry, accompanying his request with a affidavit of contest, affidavit of qualification, and an application to enter said land. None of these papers bear any file-mark, and Walker, in an affidavit filed March 16, 1883, in the local land office, says that this application was rejected by the register and receiver, on the ground that Bloss had a prior contest on the same tract.

On March 15, the day set for hearing the Bloss contest, Walker again moved the local officers to dismiss the said contest, on the same ground above stated, and on the additional ground that the notice to the entryman was insufficient, because thirty days had not elapsed since the fourth publication of the same. Bloss presented an amended affidavit of contest, to the reception of which Walker objected. The register and receiver differed as to Bloss's right to amend, and the question was submitted to the Commissioner, together with the evidence introduced by Bloss to show that the entryman had failed to comply with the timber culture law, and had forfeited all right to said land.

The Commissioner decided against Walker on the points made by him, and on June 13, 1883, instructed the local officers to render their decision in the case and give notice to all parties in interest. The local officers decided that the entry should be canceled, and on July 13, 1883, by publication gave notice to that effect, and that their decision would become final, if not appealed from within thirty days. On the 30th of the same month, Walker, in pursuance of notice previously given to Bloss, again appeared before the local officers, and made another motion to dismiss the Bloss contest, and to be himself allowed to contest said entry. This motion was based substantially on the same grounds that the former motions were, with the exception that it was alleged that Bloss had been guilty of attempting to perpetrate a fraud on the register and receiver in making proof of service on the entryman, and that legal service had not been obtained at the time of the hearing had in said contest.

The charge contained in the affidavit on which the motion is based is as follows:

That legal service of the notice of contest was never made. That in fact the registered letter containing the notice of contest was not mailed before March 15, 1883, the very day of the trial; and the affidavit of said Bloss to the effect that said notice was mailed March 1st is entirely false and untrue. That the postmaster's registry receipt attached to said affidavit, which appears to be dated March 1, 1883, was in fact dated March 15, 1883, and was fraudulently, and for the purpose of deceiving the register and receiver, changed by said Bloss, or by some one for him, so as to make it appear to be dated March 1, 1883. The figure 5 was scratched off or erased.

On December 13, 1883, Walker's motion to dismiss was overruled by the local officers, and it was "ordered that a continuance be granted for thirty-five days, that service of notice may be made by registered letter as is required by law." Proof of compliance with this order was made by Bloss on January 18, 1884, and the local officers again decided that said entry should be canceled. On the next day Walker filed with the local officers his notice of appeal to the Commissioner from their ruling, and on February 5th following the papers in the case were forwarded to the Commissioner. On December 3, 1884, the Hon. L. Harrison, then Assistant Commissioner of the General Land Office, dismissed Bloss's contest with right to Walker to contest said entry, and in passing on the case said: "The fraud and bad faith are so clearly proven by the face of the receipt and the affidavit of the postmaster, that a rehearing to determine the charge is entirely unnecessary." From this decision the case now comes here on appeal by Bloss.

The institution of another contest in this case seems to me entirely unnecessary. It is now more than eight years since Hundemer's entry was made, and more than six since the first contest against it was initiated. During this time numerous affidavits have been made by parties acquainted with the land that nothing has been done by him towards complying with the timber culture law; that he has abandoned his entry, and that his place of residence and post-office address are unknown to these parties. He has also during the last six years been repeatedly notified, by publication, by notices posted on the land, and sent by registered letters to his last known post office address, of the proceedings instituted with a view to the cancellation of his entry, and yet during all this time he has never put in an appearance. In addition to this, the local land officers have on three different occasions decided from evidence before them that this entry should be canceled, and the Commissioner in his letter of April 23, 1883, says: "The testimony taken shows that the entry has been abandoned."

I think it clear that Hundemer can have no legal claim to this land, and his entry will accordingly be canceled. The real question presented for determination here is which, if either, of the parties appearing in the case is entitled to the preference right of entry. Bloss is clearly entitled to that right, if he has not forfeited it since the initiation of

his contest. It will be observed that the charge against him is not that his contest is fraudulent, but that in conducting it he misled and imposed on the local officers by falsely swearing that he had on March 1st mailed a notice of the contest to the last known address of the entryman, while in fact this was not done till the 15th of the month; and that he, or some one for him, had erased the figure 5 from the postmaster's receipt, so as to make it appear to be dated March 1st, while in fact it was dated March 15th. That this erasure was made by some one, and that Bloss's name is signed to a paper purporting to be his affidavit, and that the fact stated in said paper is false, is clearly established; but it is not clearly established that Bloss had ever read this paper, or heard it read, or knew or suspected what it contained. Certainly the established facts do not preclude him from showing his innocence, nor deprive him of the right, before his contest is summarily dismissed, of a hearing for that purpose. When he applied for a continuance, and to be permitted to perfect his proof of service, he was asking that which was in the discretion of the local officers to grant or refuse, and the fact that it was granted is a strong indication that they did not believe he had intentionally committed a fraud on them by knowingly and wilfully making the alleged false oath, or by committing, or procuring to be committed, the alleged forgery.

The appellant having been granted a continuance to perfect service on the entryman, and having finally secured the cancellation of said entry, I know of no law applicable to the facts in this case, which deprives him of his preference right of entry. Were he after a full hearing clearly shown to be guilty as charged, he would still have the right to sue in the courts, and to contest and to make entries on the public lands.

The said decision dismissing appellant's contest is therefore reversed, and you will cause said entry to be canceled, and the appellant notified of his rights in the premises.

FINAL PROOF—PUBLICATION OF NOTICE.

JACOB SEMER.

The published notice of intention to make final proof should describe the officer before whom it is to be made definitely and explicitly.

The requirement as to publication of notice is statutory and cannot be waived.

In the case of final proof which shows due compliance with law, but is submitted, through the negligence of the local office, on defective notice, new advertisement will be required, when the proof already submitted may be accepted in the absence of protest or objection.

Acting Secretary Muldrow to Acting Commissioner Stockslager, November 17, 1887.

I have considered the appeal of Jacob Semer from your office decision of November 11, 1885, rejecting his commutation final proof, under

homestead entry 1403, for the NW. $\frac{1}{4}$ of Sec. 18, T. 113 N., R. 67 W., Huron, Dakota, land district.

Semer made his homestead entry December 4, 1882, and on July 16, 1883, offered final proof on commutation thereof, which was approved by the register and receiver, and final certificate issued. When the papers reached your office, it was discovered that the published notice of making final proof was defective, in that it failed to state before whom such proof would be made. You rejected the final proof, and required the claimant to submit final proof anew, after re-advertising. From this decision claimant appealed.

The notice in this case says, "said proof will be made before the judge or clerk of court of record in and for Hand Co., D. T." The proof was made before the "clerk of the district court in and for Hand county, Dakota Territory, within and for the second judicial district of said Territory."

When final proof is to be made before any person other than the local officers, the notice should describe that person definitely and explicitly. The notice in this case is not sufficiently definite and explicit, and it shows carelessness on the part of the local officers that such notice was allowed to go to publication, and that proof made thereunder was received by them. The action of the local officers in receiving and approving the proof was not, however, as claimed by appellant, conclusive and binding on the government, and it was proper for your office to reject the final proof because of the defect in the notice. The giving of proper notice is a statutory requirement and can not be waived or excused.

The claimant will be required to give notice anew of his intention to submit final proof. It is not the policy of the department to inflict upon an applicant for public land unnecessary hardship, and therefore, in consideration of the fact that the proof in this case is very satisfactory, showing a continuous residence for thirteen months and improvements, consisting of a frame house fourteen by twenty-two feet, with addition eight by ten feet, a barn twelve by eighteen feet, a well sixteen feet deep, and twenty-one acres of land plowed and in cultivation—all valued at \$1,000, and the further fact that it was through negligence of the register that such a defective notice was allowed to go to publication, I direct that, if upon the day advertised for final proof, no protest or objection is filed, then the proof heretofore made may be accepted as final proof.

If protest or objection is filed, then the claimant must make new proof, but under the ruling in the late case of Alfred Sherlock (6 L. D., 155) such proof will be sufficient, if it shows compliance with the law up to the date of the final certificate.

Your decision is modified accordingly.

PRIVATE CLAIM—COMPLETE FRENCH GRANT.

NEW ORLEANS CANAL & BANKING CO. *v.* STATE OF LOUISIANA.*

Adhering to the former departmental ruling it is held that the grant, under which the company claims, is a complete French grant, needing no confirmation; and that it is the duty of the Department to recognize the validity of such title so far as to direct that the public surveys be closed upon the lines of said grant.

Acting Secretary Muldrow to Acting Commissioner Stockslager, November 21, 1887.

When this case last came before the Department, the sole question involved was whether the State of Louisiana was bound by the decision of Secretary Teller of January 18, 1884, holding that the French grant under which the New Orleans Canal and Banking Company claimed title was a complete grant, needing no confirmation, and that it was the duty of the Department to cause an additional and corrective survey to be made, exhibiting the location of said grant, and to close the lines of survey of contiguous public lands upon the lines of said grant.

Subsequent to the decision of Secretary Teller, above referred to, a hearing was ordered upon the application of the New Orleans Canal and Banking Company to determine fully the validity or invalidity of certain selections made by the State, under the swamp land and school grants of lands, within the claimed limits of the grant under which the Canal and Banking Company claims title. On said hearing, at which the State and grant claimants were both heard, testimony was submitted by both parties and transmitted to your office for action thereon. Without considering the same, upon your own motion, you dismissed said proceedings, on the ground that "the matters in controversy had been compassed by the decision of the Secretary of January 18, 1884," and therefore held for cancellation the State selections within the claimed limits of said grant.

From this decision the State appealed, insisting mainly that the title under which the Canal and Banking Company claimed title was not a complete grant, and, if so, the Department had no jurisdiction to pass upon the validity of the same and in effect confirm it.

Considering this appeal, it was held that the rights of the State were not affected by a proceeding to which it was not a party, having had no opportunity to defend its own title, or to show the invalidity of an adverse claim. I therefore remanded the case to your office to pass upon the findings of the local officers, and to consider the question of jurisdiction, as well as the validity of said grants.

In that decision I did not pretend to reverse the decision of Secretary Teller, but simply held that the rights of the State were not affected by the decision of January 18, 1884, "however much I might approve the conclusions therein reached upon a proper case made, in which all the parties in interest were represented."

*For previous decisions in this case see 10 C. L. O., 3-4; 4 L. D., 473, 592; 5 *id.*, 479.

Passing upon the report of the local officers, you on October 8, 1886, adhering to the ruling of Secretary Teller, held that "the claims under consideration are complete French claims, and the Land Département of the government has jurisdiction to consider and pass upon their validity, and to segregate them from the public domain."

Upon the appeal now before me all parties in interest have been heard in the various stages of the proceedings, both as to the jurisdiction of the Department and the validity of said grants. Without further discussing the question, I am satisfied with the correctness of the decision of Secretary Teller, that the grant under which the Canal and Banking Company claims title is a complete French grant, needing no confirmation, and that it is the duty of the Department to recognize the validity of said title, so far as to direct that the public surveys be closed upon the lines of said grant.

I therefore affirm your decision.

SWAMP GRANT—INDEMNITY.

STATE OF OHIO.

The swamp grant did not take effect on lands reserved to the government in reimbursement for lands granted by previous legislation; and as such lands did not pass under said grant, indemnity claimed therefor is without basis and must be denied.

Acting Secretary Muldrow to Acting Commissioner Stockslager, November 23, 1887.

The claim of the State of Ohio to indemnity for certain land in the Defiance land district, sold by the United States at \$2.50 per acre, subsequent to the act of September 28, 1850, (9 Stat., 519) for the reason that the same was granted to it as swamp and overflowed land by the act mentioned, is before me on appeal by the duly authenticated agent of said State from your office decision of June 23, 1885, wherein you hold, in reply to a letter by counsel dated June 10, 1885, calling your attention to said claim and requesting that an account be stated, that "the State of Ohio has no legal claim."

The land for which indemnity is claimed is in the alternate sections within the grant to the State of Ohio for canal purposes, by the act of May 24, 1828 (4 Stat., 305), and which by the terms of said act were reserved to the United States.

I concur in your conclusion that the question herein was substantially disposed of by the Secretary of the Interior in his decision of November 20, 1855, refusing the claim of the State of Illinois to the alternate sections within the railroad grant of September 20, 1850, similarly reserved.

Counsel insist that those lands being offered at public sale, in September, 1844, *i. e.*, prior to the act of September 23, 1850, and sold sub-

sequently thereto, were not in a state of reservation at that date, as was the fact in the claim before Secretary McClelland, *supra*. This is not material. In the decision cited, the then Secretary expressly says, that the State has no right under the act of September 28, 1850, to any land which had been reserved by the President (under the act of September 20, 1850), for the special purposes of that act, to wit, the reimbursement to the government for the granted lands.

The act of May 24, 1828, *supra*, making the grant to Ohio for canal purposes, contained the same reservation to the United States as does the said act of September 20, 1850 (making the grant to the Mobile and Chicago railroad), passed upon by Secretary McClelland. (1 Lester, 521).

That the obvious purpose of such reservation as is made in the canal grant to Ohio and in similar legislation is to reimburse the government for the grant cannot in my judgment be successfully controverted. This reservation amounted to a disposal of the land, and consequently prevented it from passing specifically by the swamp grant of 1850. Its subsequent sale was but the accomplishment of the legislative design. Concurring therefore in the views expressed by Secretary McClelland as aforesaid, upon the similar state of facts presented by the claim of the State of Illinois, I am of the opinion that no basis exists for this claim to indemnity, no title having vested in the State.

Your decision is affirmed.

RAILROAD GRANT—COMMON GRANTED LIMITS.

SOUTHERN PAC. R. R. CO.

The grant to the Atlantic Pacific, and Southern Pacific was made by the same act, and, under the provisions thereof, the said companies were each entitled to an undivided moiety of every odd section, not reserved from the grant, falling within the common granted limits of the respective roads, without respect to priority of location or construction, the right of each company relating back to the date of the grant.

The forfeiture of the grant to the Atlantic Pacific did not re-invest the Southern Pacific with the right, title, and interest, of which it was divested by the definite location of the Atlantic Pacific, as the declaration of forfeiture expressly provided for the restoration of the forfeited lands to the public domain.

If the Southern Pacific elect to accept every other alternate odd numbered section, within the said common limits, the remaining odd numbered sections may be immediately restored to the public domain.

Secretary Lamar to Acting Commissioner Stockslager, November 25, 1887.

A rule was served upon the Southern Pacific Railroad Company to show cause why certain lands adjacent to and coterminous with the uncompleted portion of the main line of the Atlantic and Pacific Railroad Company, which are intersected by the line of the Southern Pacific Company, should not be restored to the public domain, Congress having declared a forfeiture of the grant to the Atlantic and Pacific Company as to the uncompleted portion of said road.

In considering said rule upon the answer of the Company, you held—

(1) That since the grants to both of said companies were made by the same act, the Southern Pacific "is only entitled (if at all) to and can not rightfully claim more than a moiety of the lands" in the conflicting granted limits, and the recommendation is made by your office "that every other alternate odd numbered section (as sections 1, 5, 9, etc.,) be now restored to the public domain, leaving the remaining odd numbered sections in reservation for the present";

(2) That the lands within the granted limits of the Southern Pacific main line and the indemnity limits of the Atlantic and Pacific, are not affected by said act of forfeiture, and they should continue in reservation for the present;

(3) That the lands within the granted limits of the Atlantic and Pacific and the indemnity limits of the Southern Pacific "could not have been selected as indemnity by the Southern Pacific," for the reason that, although said lands were withdrawn for the Southern Pacific Company, they fell within the granted limits of the Atlantic and Pacific, upon the subsequent definite location of its road;

(4) That the lands within the common indemnity limits of the Atlantic and Pacific and the Southern Pacific (both main and branch line) should still remain in reservation;

(5) That the Southern Pacific Railroad Company can have no valid claim to lands within the common granted limits of the Atlantic and Pacific and the Southern Pacific branch line, and that such lands should be at once restored; and

(6) That the Southern Pacific Company has no right to any lands within the indemnity limits of the Atlantic and Pacific Railroad Company and the granted limits of the branch line of the Southern Pacific Company, for the reason that they are excepted from the grant to the latter company on account of the prospective right of the former company to select said lands for indemnity.

While the rule was pending before the Department, all lands withdrawn for indemnity purposes for the benefit of the Southern Pacific Railroad Company and the Atlantic and Pacific R. R. Co., were restored to the public domain by order of August 15, 1887. (6 L. D., 84-92.)

Counsel for the Southern Pacific Railroad Company have now filed an application protesting against any further action for the restoration of lands within granted limits, because—(1) The right of the company vested by definite location and final completion of the road to all lands mentioned in the Commissioner's report of March last, and that the question as to what particular lands within said limits are granted or excepted, does not properly arise now and there is no case before the Department requiring a decision. (2) Because the lands were withdrawn by the act of Congress making the grant.

I see no reason for any further action by the Department upon this rule, except as to lands embraced within the common granted or primary limits of both roads.

A decision upon this question is rendered necessary in order that you may not be hindered or delayed in the adjustment of this grant under the general instructions issued from this Department of November 22, 1887.

The act of Congress of July 27, 1866 (14 Stat., 292) granted to the Atlantic and Pacific Company:

Every alternate section of public land, not mineral, designated by odd numbers, to the amount of ten alternate sections of land per mile on each side of said railroad, whenever it passed through any State, and whenever on the line thereof the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is designated by a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other land shall be selected by said company in lieu thereof.

By the 18th section of said act the Southern Pacific road was authorized to connect with the Atlantic and Pacific road at a point near the boundary line of California, with a similar grant of land subject to all the conditions and limitations provided for in said act.

The grant contained a proviso "that if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted to the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act."

Here is a grant made by the same act to each road, of certain odd sections, to be designated by the filing of a map of definite location, and of the right to select other lands as indemnity for such odd sections within the granted lands as may have been granted, sold, reserved, or occupied by homestead and pre-emption settlers prior to date of definite location.

Therefore the filing of the map of definite location by either of the roads vested in such road the right and title to all the odd numbered sections within the designated limits and not within the exceptions referred to, and of the right to select other lands within the indemnity limits in lieu of lands so excepted. But as neither road was prohibited from constructing upon or near the general line of the other road, and it being evident from the proviso referred to that Congress did not intend to make a double grant for the same general line of road, that right and title was subject to be divested to the extent of a half interest in all odd numbered sections that might fall within the common granted limits of both roads.

The Southern Pacific Company located its main line January 3, 1867, and by the terms of the grant its right immediately attached to every odd section of land, not of the character excepted by the grant, and within the ten mile limit, subject, however, to be divested to the extent of a half interest in every such odd section that might fall within the

common limits of both roads, after the filing of the map of definite location by the Atlantic and Pacific Company.

The Atlantic and Pacific Company filed its map of definite location April 11, 1872, and April 16, 1874, showing that the primary or granted limits of said road overlapped and conflicted with the primary or granted limits of a portion of the Southern Pacific road. As to the lands falling within the granted limits of both roads, the filing of the map of definite location by the Atlantic and Pacific Company, showing such conflict, immediately divested the Southern Pacific Company of the right and title to a half interest in all such odd sections, and from that moment and by that act the two companies became entitled to equal undivided moieties in such sections, without regard to the priority of location of the line of the road, or priority of construction; the right of each company relating back to the date of the grant. *St. Paul and Sioux City R. R. Co. v. Winona and St. Paul R. R. Co.* (112 U. S., 720); *Sioux City R. R. Co. v. Chicago R. R. Co.* (117 U. S., 406).

It can not be questioned that these completed acts on the part of both roads vested in each of said companies the right and title to their respective interests in said conflicting limits, and determined the extent and quantity of the grant to each company along that portion of their respective roads. That is, the Atlantic and Pacific company had a vested interest in every odd section within the limits of its grant of the character contemplated by the grant, and not in conflict with the limits of the other road, and an undivided half interest in all such sections within the conflicting limits of the two roads, and also the right to indemnity for such sections or interest in sections that may have been preempted, sold, reserved, etc., as provided for by the grant. The same right vested in the other road as to lands similarly situated within its limits, and those vested rights, titles, and interests were existing at the date of the forfeiture of the grant to the Atlantic and Pacific Company. If the Atlantic and Pacific Company had no such title and interest in these lands, there would have been nothing to forfeit. That it did have such right, title, and interest can not be questioned.

But it is insisted that by the act of forfeiture the Southern Pacific Company was re-invested with the right, title and interest of which it was divested by the filing of the map of definite location by the Atlantic and Pacific Company. I do not think this position tenable, even if the act declaring a forfeiture of those lands was silent as to the disposition to be made of them. There was no restoration to a right in the Southern Pacific Company, because that company had no right to restore. The act of forfeiture divested the Atlantic and Pacific Company of all right, title and interest in said lands, and re-invested the title in the government.

Congress, by the act of forfeiture, could have invested the Southern Pacific Company with the entire interest in the lands held in common by the two roads, but that it was not the intention of Congress to dis-

pose of this interest of the Atlantic and Pacific Company in that manner is evident from the act of forfeiture, which declares that:—

All the lands which are adjacent to and coterminous with the uncompleted portions of the main line of said road (Atlantic and Pacific), embraced within both the granted and indemnity limits be and the same are hereby declared forfeited and *restored to the public domain*.

The interest of the Atlantic and Pacific Company having been forfeited to the United States, the effect of said forfeiture was to make the United States a tenant in common with the Southern Pacific Company as to said lands, and therefore all the odd sections within said limits should still remain in reservation until a partition thereof has been made.

If said company is willing to accede to the plan suggested by your office and take only every other alternate odd numbered section within said common limits, I know of no objection to such a course being taken, and the remaining odd numbered sections could be immediately restored to the public domain. If, however, the company declines to accept said plan, it will be necessary to take other steps looking to a partition of the lands granted.

You will therefore notify the Southern Pacific Company that it will be allowed a reasonable time to advise your office of its acceptance or rejection of the plan proposed, and if said plan is rejected you will report the same to this Department for further action.

It not being necessary, at present, to pass upon the remaining question presented in the rule, the papers are herewith returned.

TIMBER CULTURE—SECOND ENTRY.

R. E. GILFILLAN.

A second entry may be allowed when, through no fault of the entryman, the first entry could not be carried to patent.

The entryman must exercise due care and prudence in the selection of land and entry thereof, and in the absence of such care will not be allowed a second entry if the first fails.

Acting Secretary Muldrow to Acting Commissioner Stockslager, November 23, 1887.

I have considered the appeal of R. E. Gilfillan, from your office decision of June 23, 1886, refusing to restore his timber culture right and allow him to make entry for the NE. $\frac{1}{4}$ of Sec. 1, T. 5 N., R. 29 W., McCook, Nebraska land district.

Gilfillan made timber culture entry January 14, 1885, for the SE. $\frac{1}{4}$ of Sec. 4, T. 1 N., R. 28 W., and on July 22, 1885, filed a relinquishment of said entry, said relinquishment having been executed March

30, 1885. On June 2, 1886, he filed his petition to have his right restored, filing therewith an application to enter the NE. $\frac{1}{4}$ of Sec. 1, T. 5 N., R. 29 W.

In passing upon this application you say:

It seems that the party relied too much upon the representation of others in making his entry. I must, therefore, decline to grant his request and for the further reason that the act of June 14, 1878, allows but one timber culture entry.

From this decision Gilfillan appealed.

This application is accompanied by the affidavit of the applicant duly corroborated, which sets out in substance that he was induced to make entry for said SE. $\frac{1}{4}$ of Sec. 4, T. 1 N., R. 28 W., by the false representations of a certain locator, who represented that there was no right or claim to said land except an old pre-emption claim which "had run out and was no good whatever, and that the pre-emptor had abandoned the same and had never lived on the land and that there would be no trouble in this affiant securing the land."

He further states that he was a young man only twenty-one years of age, from the east, and not being acquainted with the manner of taking land, relied on the statements of the locator. That shortly afterwards he found he had been deceived and misled as to the facts concerning the land. When he learned that he had been misled and had no chance to hold or get this land, he relinquished his right to the government without consideration.

If by the statement that the act of June 14, 1878, allows but one timber culture entry you mean that under no circumstances may a second entry be made, I can not concur with you.

Entries under the timber culture law should be governed as to amendments and the allowance of second entries, by the rules that govern homestead entries under like circumstances. There are circumstances under which a second entry may be properly allowed as where through no fault or neglect of the entryman the first entry was incapable of being carried to patent.

The petition in this case does not set up facts that entitle the applicant to the relief asked. It appears that he was aware that there was a declaratory statement for the land on file, and this was sufficient to put him upon his guard. The pre-emption filing was no bar to his entry for the land, he simply took the chances of that filing being perfected into an entry. That he was misled and deceived by the party whom he hired to locate him while unfortunate for him, is not a sufficient reason for allowing him a second entry. The petition does not show that the applicant exercised the slightest care, or prudence in making his selection, even to the extent of inspecting the land in person. For the reasons herein stated, your decision rejecting the application is affirmed.

TIMBER CULTURE ENTRY—AMENDMENT.

CHRISTIAN ZYSSETT.

Though the language of the timber culture law with respect to the amount of land that may be acquired thereunder differs somewhat from the corresponding limitation in the homestead law the intent is the same, and amendments under either law should be governed by the same rule.

Acting Secretary Muldrow to Acting Commissioner Stockslager, November 23, 1887.

I have considered the appeal of Christian Zyssett from your office decision of June 23, 1886, refusing to cancel without prejudice his timber culture entry for the SW. $\frac{1}{4}$ of Sec. 22, T. 7 N., R. 36 W., McCook, Kansas, land district, and allow him to make timber culture entry for the NE. $\frac{1}{4}$ of Sec. 29, same town and range.

Zyssett states in his affidavit that prior to making entry he went with one John McClellan, who had assisted in making the survey of that township, to select the land. That he selected a tract which the said McClellan believed and said was the SW. $\frac{1}{4}$ of Sec. 22, in said town and range, and afterward made an entry for said tract. At that time there was no one residing near said land, and no improvements in that vicinity to serve as a guide in making his selection. After making said entry he discovered that said McClellan was mistaken and that the land he was on and had selected for entry was the NE. $\frac{1}{4}$ of Sec. 28. He states that the land now embraced in his entry is sandy and entirely unfit for the cultivation of trees, or for farming purposes, and that the land actually selected by him and which he supposed he had entered is embraced in a valid adverse claim. The applicant is corroborated in all his statements by the said McClellan and another witness.

You allowed the amendment of his homestead entry, made at the same time and under the same circumstances, but refuse the application as to his timber culture entry, "for the reason that the act of June 14, 1878, allows but one timber culture entry."

While the wording of that clause of the timber culture law, regulating the quantity of land that may be acquired thereunder, differs somewhat from the wording of the same clause in the homestead law, the effect is the same, *i. e.*, to prohibit the acquiring of more than one tract under either law. Timber culture entries should be governed as to amendments by the same rule that obtains in the case of homestead entries.

This applicant seems to have acted in good faith and to have exercised that degree of care that a man of ordinary prudence would have exercised. The case is very similar to that of Henry E. Barnum (5 L. D., 583), and should be controlled by the ruling in that case.

Your said decision is reversed, and the application will be allowed, subject to any adverse claim attaching prior to the date of this application.

*RAILROAD GRANT—CONFLICTING SETTLEMENT CLAIM.**CAYCE v. ST. LOUIS & IRON MOUNTAIN R. R. CO.*

The entry by a pre-emptor of a portion of the land settled upon, and filed for, is an abandonment and relinquishment of the land not included in the final purchase. A settlement alleged subsequent to the grant, and abandoned prior to definite location, leaves the land subject to the operation of the grant, as the condition of land at definite location determines whether it will pass under the grant.

The effect of a residence confined to a forty acre tract held under patent, can not by occupation and cultivation, be extended to include the remainder of the quarter section.

Acting Secretary Muldrow to Acting Commissioner Stockslager, November 25, 1887.

This case involves the right to the W. $\frac{1}{2}$ of NE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Sec. 30, T. 15 S., R. 28 W., Camden land district, Arkansas, which was certified to the State of Arkansas July 13, 1857, under the grant of February 9, 1853, for the Cairo and Fulton Railroad Company.

On December 8, 1884, William H. Cayce made application to enter said tract under the homestead law, which was rejected by the local officers, for the reason that the land was not subject to homestead entry, and Cayce appealed. This decision was affirmed by the General Land Office February 19, 1885, from which no appeal was taken, but on June 1st ensuing you re-opened the case, vacated the decision of your predecessor of February 19, and ordered a hearing between Cayce and the railroad company. Upon the hearing the register and receiver held that the land was subject to homestead entry, and upon appeal you affirmed said decision. From this decision the company appealed to the Department.

The question of jurisdiction is raised in this case upon the ground that the fee simple to lands granted to the State of Arkansas, for railroad purposes, vested by force of the act itself, and without patent, and that the certification by the Department of this land to the company is evidence of the fact that it was subject to the operation of the grant.

I do not consider it necessary to pass upon that question as it is clearly the duty of the Department to recommend that suit be instituted to cancel an outstanding title, whenever it shall appear that lands have been illegally certified or patented under any public land grant. It is therefore my duty to consider the case on its merits.

It is admitted that in 1846 Mrs. Nix took possession of and settled upon the whole of the NE. $\frac{1}{4}$ of Sec. 30, which included the land in controversy, and that on the 22d of April, 1853, she filed her declaratory statement for the entire quarter section, alleging settlement thereon the first of April 1853. On March 31, 1854, she made pre-emption cash entry of the NE. $\frac{1}{4}$ of said quarter section, fixing by her proof the first

day of April, 1853, as the date of her settlement, the same as in her declaratory statement, and patents issued to her for said tract.

There can be no question that the entry by Mrs. Nix of the one quarter of said NE. $\frac{1}{4}$ was a complete abandonment and relinquishment of the remaining three quarters. This is so well established that it is not necessary to discuss it further.

That part of the road opposite the tract in question was definitely located August 11, 1855. So it appears from her own statement, under oath, that her settlement with a view to pre-emption was not made until after the grant to the road, and having entered one quarter of said quarter-section prior to definite location, the balance of said quarter-section was at that date—so far as her prior settlement had affected it—open public land.

Upon the hearing in this case it was shown that Mrs. Nix took possession of and occupied the entire quarter-section from 1846 to date of the grant, and hence it is argued that at that date she had the right to file for the entire quarter-section.

In the face of her declaratory statement and of the proof submitted in making entry, showing that her settlement under her pre-emption claim was not made until April 1, 1853, it may be questioned whether her occupancy of the premises prior to that date would have the effect to except said tract from the operation of the grant. But admitting that at the date of the grant a pre-emption claim by virtue of this settlement existed as to the entire quarter section, it can not be questioned that at the date of definite location the tract in controversy, so far as her settlement had affected it, was open public land.

This was directly decided by the supreme court in the case of *Nix v. Allen* (112 U. S., 129), wherein the court, in passing upon this question, held that "the exercise of the right of pre-emption under the act of September 4, 1841 (5 Stat., 453) by an entry of one quarter of a quarter-section of land, was an abandonment of the right to enter under that act for the remaining three-quarters of the section."

It is, however, insisted upon by counsel for Cayce that the grant of February 9, 1853, took effect only upon such lands as were free from a pre-emption claim at the date of the grant, and that although the lands might be free from such claim at the date of definite location, they would still be excepted from the operation of the grant, unless they were in such condition at the date of the grant.

The grant in this case is of—

Every alternate section of land designated by even numbers, for six sections in width, on each side of said road and branches, but in case it shall appear that the United States have, when the line or route of said road is definitely fixed by the authority aforesaid, sold any part of any section hereby granted, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents to be appointed by the Governor of said State to select, subject to the ap-

proval aforesaid, from the lands of the United States most contiguous to the tier of sections above specified, so much land in alternate sections or parts of sections as shall be equal to such lands as the United States have sold, or to which the right of pre-emption has attached as aforesaid, etc.

I can see no material distinction between this grant and the grants to other roads in this respect. The uniform construction of the courts and of the Department of similar grants has been that the condition of the lands at the date of definite location determines what lands pass by the grant. This construction must be held to apply in this case.

Cayce claims the right to make homestead entry of this tract by reason of the existing settlement and improvement of the land by Mrs. Nix at the date of the grant; but it is also argued that the settlement and cultivation of the tract by John B. Nix, both at the date of the grant and the date of definite location, also served to except the tract from the operation of the grant.

Every question as to the settlement of the tract in controversy and his right to the same was fully and completely disposed of by the decision of the court in the case of *Nix v. Allen*, *supra*.

On May 28, 1858, Mrs. Nix conveyed the land she entered—to wit, the NE. $\frac{1}{4}$ of the quarter-section, to her son, John B. Nix, who arrived at full age during the year 1857, and who continued to reside with her on said tract, and also cultivated other parts of the quarter-section.

On May 14, 1875, the railroad company sold the W. $\frac{1}{2}$ and SE. $\frac{1}{4}$ of said quarter-section to Thomas Allen, who brought an action of ejectment against John B. Nix to recover possession thereof.

In his defence, as shown by the record in the case, the facts as to the settlement of both Mrs. Nix and himself were fully set forth. Judgment was rendered in favor of Allen, and Nix afterward filed a bill in the circuit court of the United States for the district of Arkansas to enjoin the execution of that judgment and to obtain a conveyance of the legal title to the property, on the ground that Allen held it in trust for him. The court dismissed the bill, and Nix filed an appeal to the supreme court.

One of the claims set up by the appellant was that he had a complete equitable title to the land under the acts of Congress as a pre-emptor.

Upon this point the court said :

All the rights of pre-emption which the appellant sets up originated with his mother. In his application to enter the lands, made in 1878, he expressly bases his claim on her original settlement and his inheritance from her. He does not pretend that he made a settlement himself before the rights of the railroad company accrued. In fact, he could not have made such a settlement, because he remained a minor until 1857, and the lands were withdrawn from market in 1853, on account of the railroad grant. Only persons over the age of twenty-one years could become pre-emption settlers. Such is the express provision of the pre-emption act. If, then, his mother, had she been alive, could not have made a pre-emption entry in 1878, he could not.

Then referring to the cultivation by Nix of the other part of the quarter-section, besides that portion purchased from his mother, and upon which he resided, the court said :

Under the circumstances, his residence was, in law, confined to the land he owned. Seeing this difficulty, he applied for the purchase of the whole quarter-section, basing his claim apparently on the original settlement and declaratory statement of his mother for the pre-emption of that tract. In this way he sought to connect his residence upon the NE. $\frac{1}{4}$ with his occupation of the other quarters. That he can not do, as by the entry of the NE. $\frac{1}{4}$ his mother separated her residence from the rest of the quarter-section, and he has done nothing since to change that condition of things. It follows that the appellant is not entitled to the privileges of the act of 1871, and his claim, both under the acts of Congress and those of the State, has failed.

Every question that might now be presented seems to have been fully passed upon by the court in the decision referred to ; but independent of this, from a careful review of the record now before me, I can see no ground for disturbing the action of the Department in certifying the land to the State for the benefit of said road, and hence the application of Cayce should be rejected.

Your decision is reversed.

PRACTICE—APPEAL—RULE 48 OF PRACTICE.

CURTISS *v.* SIMMONS.

A decision of the local office that the proof offered does not sustain the charge, is a finding that becomes final as to the rights of the contestant in the absence of appeal.

In such event, while the General Land Office is not precluded from reviewing the decision of the local officers, the case should be considered as between the claimant and the government and the entry held intact, if it does not appear illegal or that the entryman has acted in bad faith.

Acting Secretary Muldrow to Acting Commissioner Stockslager, November 26, 1887.

I have considered the case of F. B. Curtiss *v.* James Simmons, as presented by the appeal of the latter from the decision of your office dated September 21, 1885, holding for cancellation on his homestead entry of the SW. $\frac{1}{4}$ of Sec. 14, T. 104 N., R. 67 W., 5th P. M., made May 10, 1882 at the Mitchell land office in the Territory of Dakota.

The record shows that said Curtiss filed in said office, on March 12, 1884, his affidavit of contest against said entry alleging abandonment, change of residence, and failure to settle and improve said claim as required by the homestead law and the regulations of this Department. A hearing was duly had, the testimony being taken before a notary public on May 8, 1884. Both parties appeared in person, and were represented by counsel. From the evidence submitted, the local land of-

ficers rendered their joint opinion that the contestant had not proved the charge of abandonment, and that said contest ought to be dismissed. From this decision no appeal was filed by the contestant and on February 19, 1885, the local land officers forwarded the papers for the consideration of your office. On September 21, 1885, your office examined the papers and held that the testimony submitted in the case shows that seventeen and one-half acres of said tract had been broken, a part of which had been cropped in oats, a stable and granary built on the land; that a dwelling had been built on said claim and afterwards torn down, hauled away and sold; that the claimant had never lived on the land but had resided with his mother on an adjoining tract; that the evidence, by a "large proportion" shows that claimant never had any furniture in the house nor was there evidence of habitation about the premises; that the testimony clearly shows that the claimant entirely failed to establish or maintain a residence on said land, and that the decision of the local land officers must be reversed and said entry held for cancellation on the ground of abandonment as charged in the affidavit of contest; that the failure to reside on the land was the clearest evidence of abandonment and that the decision of the local land officers was reversed "under the provisions of point No. 2, rule 48, Rules of Practice."

On November 20, 1885, counsel for the claimant filed in your office a motion for a reconsideration of said decision upon the ground that said second subdivision of rule 48 did not apply to the case at bar.

On December 16, 1885, your office reviewed the proceedings in said case, quoting in full the decision of the local land officers, and refused to reconsider said decision. The ground for such refusal was that the local officers failed to find any facts, from the evidence, upon which they base their conclusion that said contest should be dismissed, and that your office must of necessity examine the testimony and render judgment upon the facts as found in the record.

The local land officers state in their decision that they "do not think, however, that the proof tendered by contestant is definite enough on the point to uphold the charge of abandonment, while on behalf of claimant, this testimony is broadly contradicted." This in effect was a finding of the local land office upon the contradictory testimony offered, and, hence, the same became final so far as the rights of the contestant are concerned, in the absence of an appeal. But it does not necessarily follow, that your office, in the absence of an appeal, does not have the right to review the decision of the local land office in said case.

Rule 48 (*supra*) provides, that :

In case of a failure to appeal from the decision of the local officers their decision will be considered final as to the facts in the case, and will be disturbed by the Commissioner only as follows (2) Where the decision is contrary to existing laws or regulations.

This provision has frequently been considered by this Department. In the case of *Morrison v. McKissick*, (5 L. D. 245) it was held that the failure of the adverse party to appeal did not preclude your office from reviewing the decision of the local land office, and that "the approval required of the Commissioner is not simply a ministerial act, but the decision of a tribunal especially charged with the duty of determining from the evidence whether the law has been complied with, and in the discharge of this duty the whole record of the case should be considered by him as if it had been submitted to him originally for his decision thereon." It was also held, that the failure of the claimant to appeal might be considered a waiver of any claim by him, but it could not prevent your office from considering the whole record and determining whether the claimant had sufficiently complied with the requirements of the law to entitle him to a patent.

In the case of *McSherry v. Gildea* (ibid., 585) the Department again considered said provision of Rule 48, where the local land officers found as a matter of fact that the claimant "had never established a bona fide residence upon the land and that he had not acted in good faith", and it was held that "this being their finding as to the facts I fail to see wherein their decision recommending the entry for cancellation was contrary to existing laws or regulations."

It was further stated that "Rule 48 never contemplated that, as regards the parties to the case a decision of the local officers, not coming within any of the exceptions to said rule, could be overruled by your office."

With said motion for consideration were filed several affidavits of claimant, and others, tending to show that he had established his residence on said tract as required by law, and that he was only temporarily absent for the purpose of earning money to improve his claim.

Since the contestant has failed to appeal the case must be considered solely between the entryman and the government.

It is not shown by the evidence that the entry is illegal or that the claimant has acted in bad faith. Section 2291, Revised Statutes, allows a claimant seven years within which he may make final proof. If the claimant fails to comply with this law his entry is liable to contest, and when he offers final proof the entryman must show full compliance with the requirements of the homestead law and the regulations of the Department. But in the absence of evidence showing bad faith on the part of the entryman or the illegality of the entry, there does not seem to be any good reason why the entry should not remain intact and the claimant have an opportunity of making final proof as the law directs.

The decision of your office is modified accordingly.

HOMESTEAD—SECOND ENTRY.

JASPER N. SHEPHERD.

The rule that obtains in the allowance of a second filing under the pre-emption law, applies with equal force to similar claims under the homestead law.

A second entry may be allowed where the first failed through a mistake of fact on the part of the entryman as to the character and identity of a prior record claim; such mistake appearing susceptible of explanation and the good faith of the applicant being apparent.

Acting Secretary Muldrow to Acting Commissioner Stockslager, November 26, 1887.

Jasper N. Shepherd, on May 22, 1885, made homestead entry for the SW. $\frac{1}{4}$ of Sec. 14, T. 20 S., R. 25 W., Wa Keeney land district, Kansas, under circumstances set forth in his corroborated affidavit as follows:

Being at that time a stranger in Kansas, understanding little about the land laws and being entirely unacquainted with the sections, townships, and ranges thereabout, he selected a tract of land that suited him, and employed and paid a person who bore the reputation of being a competent land locator to attend to the matter of seeing that the tract selected by him was free from other claims, and of making out his papers for him. Said land locator, after making examination at the Wa Keeney land office, informed Shepherd that there was marked opposite the tract upon the books of said office the notation of a pre-emption declaratory statement, made by one Samuel Charter, September 18, 1878; but that said filing had long previously expired, and was no hindrance to his making entry of the tract. Thereupon said land locator made out the necessary papers, and (some little time thereafter—the tract being over fifty miles from the land office) Shepherd took them to the Wa Keeney land office. On presenting them he was informed by some one connected with the office that there was already a pre-emption filing on the tract, and that his entry, if he made it, must be made subject to said prior filing. To this Shepherd agreed. He at once left Kansas for his former home in another State, and in a few weeks returned, with his family and all his property, to take up his residence on the land described and entered. On arriving there he found one Albertus Miller and his family residing on the tract, and claiming the same by virtue of a pre-emption filing made April 22, 1885, alleging settlement the 20th of same month. Shepherd alleges that when he and the land locator examined the land there was no indication of settlement; and that when he was told at the land office that there was a prior pre-emption filing on the land, he supposed reference was made solely to Charter's filing of 1878—seven years before. Shepherd consulted a lawyer, who informed him that the pre-emptor Miller had the better right to the land, and advised him to select some other tract, take up his residence thereon, and apply for an amendment of his entry. Shepherd could find no vacant land in the vicinity; but finally purchased the improvements of a settler upon the NE. $\frac{1}{4}$ of Sec. 2, T. 18 S., R. 23

W., took up his residence on said tract, and has made it his home ever since. Meantime, Miller has proved up on his pre-emption claim and made payment for the tract.

Your decision of May 27, 1886, holds that "the showing made by Mr. Shepherd does not satisfactorily establish the illegality of his entry; . . . his application can not be granted."

It seems to me very natural under the circumstances that Shepherd, when informed at the local office of a prior filing upon the tract, should take it for granted that it was the same (Charter's) prior filing to which his attention had previously been directed, and which (after the lapse of seven years) could not stand in the way of his making homestead entry. He seems to have acted throughout upon advice which he had reason to consider reliable, and while it is conceivable that he might have been more thorough in his investigations, there does not seem to have been such gross carelessness as to call for so severe a punishment as the forfeiture of his homestead right—for this would practically be the result, if your office decision were affirmed. While on the facts as presented the application can not properly be treated as an application to amend, it being rather an application to make a new homestead entry, there is, I think, in view of all the circumstances, sufficient reason to give it favorable consideration as an application to make a second entry. There is no adverse claim to the land which Shepherd now seeks to enter, and the question is one solely between him and the government.

It is now manifest that he could not acquire title under his former entry, for Miller, the adverse claimant to that tract, has made final proof and received final certificate.

The Department has held, notably in the case of Hannah M. Brown (4 L. D., 9), and in that of Goist v. Bottum (5 L. D., 643), that a second pre-emption filing should be allowed when the first failed by reason of a prior adverse claim, or without fault on the part of the pre-emptor, the ground of such holding being that the law by its restriction to one pre-emptive right, "meant a right to be enjoyed in its full fruition, not that a fruitless effort to obtain it should be equivalent to its entire consummation." The principle thus enunciated applies with equal force to homestead entries and rights to be acquired thereunder.

In the case at bar an adverse claim has proved superior to Shepherd's, showing that he could not consummate his claim to the tract entered by him. While he was not entirely free from fault in not making more thorough investigation before making his entry, his failure in that regard may, as between him and the government, and in view of his explanation, properly be excused. His good faith and honesty of purpose in the matter are evident, and he should not be made to suffer for a mistake, which a man situated as he was might very naturally make.

For these reasons your office decision is reversed, and you will allow Shepherd to make homestead entry on the tract covered by his application.

*PRACTICE—MOTION TO DISMISS—EVIDENCE.***MONTGOMERY v. PFEIFER.**

A favorable decision on a motion to dismiss, filed by the defendant, after the submission of the contestant's evidence, obviates any necessity on the part of the defendant to submit testimony while such judgment remains unreversed.

Acting Secretary Muldrow to Acting Commissioner Stockslager, November 26, 1887.

I have considered the case of Eli Montgomery v. John Pfeifer, as presented by the appeal of the latter from the decision of your office dated June 10, 1885, holding for cancellation on his homestead entry of the SE. $\frac{1}{4}$ of Sec. 27, T. 114 N., R. 66 W., made Oct. 19, 1882 at the Huron office in the Territory of Dakota.

The record shows that Montgomery initiated a contest against said entry upon the charge of abandonment. A hearing was duly had, at which the claimant appeared and the contestant not appearing in person, was represented by counsel. After the testimony of the plaintiff's witnesses had been offered, the counsel for the claimant submitted a motion to dismiss said contest for the reason that it was not a bona fide contest, because the contestant did not reside in said Territory and did not testify in said case, and for the further reason that the testimony submitted did not show that the entryman had abandoned said land. The local land officers overruled the objection that the contestant was not a resident and had not testified, but held that "there is nothing to prove abandonment on the part of Pfeifer" and they decided in his favor.

On appeal, your office found from the testimony, that claimant commenced to build a shanty on said land about April 7, 1883, to which he made additions on May 19, 1883, and placed a door to the house and put a bunk and other articles of furniture therein; that prior to May 19, 1883, said cabin was not habitable, having no floor, door or window, and being only partially roofed; that claimant slept in the house on May 19, 1883, but has not been seen about the premises since that date, and prior to the contest; that no one lived on the claim up to date of contest, as shown by the testimony of three of the neighbors; that the claimant, though personally present did not testify, and that if he established his residence on May 19, 1885, he did not maintain the same continuously up to the date of contest.

Your office held that the improvements were slight and the claimant's good faith did not affirmatively appear, and accordingly reversed the decision of the local land officers.

From a careful examination of the record I am of the opinion that the contestant made a prima facie showing that would warrant the cancellation of said entry in the absence of any defense. But the counsel for appellant insists that the reason why the defendant did not offer any testimony was, that he was advised by his counsel that the contestant

had failed to make out a case, and it was useless and unnecessary to cumber the record with more testimony. Upon the motion of the claimant to dismiss said contest, a decision was rendered by the local land officers in his favor, and hence he was under no obligation to submit testimony in his own behalf while that judgment remained unreversed. Case of James Copeland (4 L. D., 275), and also *West v. Owen* (*Ibid.*, 412) and *McMahon v. Grey* (5 L. D., 58). It follows, therefore, that said case must be returned to the local land officers, and they will be directed to advise the parties in interest that at a place and time to be fixed by said officer, a rehearing will be had and the claimant will have an opportunity to present his defense and the contestant to offer evidence in rebuttal.

Upon receipt of the report of the local land officers, with their opinion upon the testimony, your office will re-adjudicate the case.

Said decision is modified accordingly.

DESERT LAND ENTRY—APPLICATION—AFFIDAVIT.

ISAAC H. ORR.

The conditional presentation of the papers to the local office, with instructions, under certain contingencies, to file them, does not constitute a legal application.

The failure to fill a blank left in the prescribed form of the preliminary affidavit should not defeat the application, where the intended use of said blank was not apparent, and the affidavit in all other particulars followed the form prescribed and furnished the requisite information as to the description of the land, its quality and character.

Acting Secretary Muldrow to Acting Commissioner Stockslager, November 26, 1887.

I have considered the appeal of Isaac H. Orr from your office decision, dated June 3, 1885, refusing to accept his desert land declaration for certain described land in township 44 north, range 94 west, Cheyenne, Wyoming, land district.

Appellant's declaration and accompanying affidavits, constituting his desert land application, it appears, were first presented to the local office January 22, 1885, by R. A. Torrey, as attorney for applicant, accompanied by the following request:

I do not wish these filed without further word from me, unless to prevent other parties locating same tracts. I wish the entries to be made by parties out in the country, if adverse legislation give time to perfect the papers, which I fear will not be the case; hence send these, but wish to substitute other declarations if I can. I will have them sent to you (if I get them) and on their arrival will notify you as to disposition to be made of them.

The local office informed the attorney that it could not hold the papers conditionally, and as a matter of courtesy to him would deposit same with accompanying check in the bank of his deposit.

After a time (the exact date it appears can not be ascertained) and after further correspondence between the local office and the attorney,

the declaration and other papers in the case were produced from the bank, and upon examination were held by the local office to be defective, because the "blank as to the character of the land" was not filled.

For this reason the register, under date of March 10, 1885, returned the papers to the attorney for completion, informing him that "this entry will be accepted, if no others intervene when returned to this office."

The papers, it appears, were not returned to and filed in the local office, but, after first having had the blanks filled as required by the letter of the register, the attorney forwarded them to your office, with an appeal from the decision of the register. In the appeal, which bears date April 10, 1885, it was claimed that the reason for not accepting and filing the declaration as requested was not a valid or material one, and that the action of the register operated to prevent justice being done in the case, as almost immediately after the return of the papers for correction a second entry for same tract was accepted and filed.

Your office, by its decision of June 3, 1885, very properly held that the conditional presentation of the papers to the local office January 22, 1885, constituted in no sense a valid application, but was an attempt on the part of the attorney to make the local office a special agency for purposes of his own.

With relation to the subject-matter or ground of the appeal, your office held that as the requirement of the local office, with reference to filling the blanks in the affidavits, had been complied with, the question raised by the appeal was no longer in the case, and need not be considered. It states, as to the intervening entries, that there are in conflict with appellant's proposed entry, the following: Nos. 2340 and 2341, made February 11, 1885, by Andrew H. Hershey and Alonzo Y. Richards, respectively, and Nos. 2382 and 2386, made February 26, 1885, by John H. Shaw and William Marshall.

Your office decision concludes by stating that "appellant's application is now in due form and duly corroborated," and at his election he will be allowed to enter any of the lands embraced in his description to which no prior adverse right has attached. From this decision Orr appeals, and his attorney states that, after the blanks in the affidavits had been filled in as required by the local office, the papers were again presented, when he was told that the lands had been located by another person; that finding himself debarred from entering the lands chosen by an omission, believed to be immaterial, in the papers as first filed, he then appealed to your office claiming, as he now claims, that the supplied words were not necessary to make the application valid, and that without them the application meets the requirements of the law. The register and receiver state, under date of April 23, 1885, that the papers were not again presented to them for action after their requirement that the blanks be filled.

Counsel for appellant calls attention to the fact that your office did not pass upon the merits of the case, as presented by the appeal from the action of the local office, but treated said appeal as waived and abandoned, as evidenced by the fact that the blanks had been filled as required by the register's letter. He denies any waiver or intention to waive or abandon, and his course in filing his appeal with the corrected application in your office would seem to sustain his position.

Upon an examination of the affidavits accompanying appellant's declaration as originally filed, I am of the opinion that they were such as to meet the requirements of the law, and that no rights were lost by the omission to fill the blank referred to with the words "second bottom land, with some sage thereon." Claimant in his declaration swore that the land was desert and would not without irrigation produce an agricultural crop. His two witnesses swore from their personal observation and examination of the land that it was desert land; "that said land will not without artificial irrigation produce any agricultural crop; that no agricultural crop has ever been raised or cultivated on said land, for the reason that it does not contain sufficient moisture for successful cultivation; that the same is essentially dry and arid land, wholly unfit for cultivation without artificial irrigation; that said land can not be successfully cultivated without reclamation by conducting water thereon; that said land has hitherto been unappropriated, unoccupied and unsettled, because it has been impossible to cultivate it successfully on account of its dry and arid condition; that it is a fact well known, patent, and notorious, that the same will not, in its natural condition, produce any crop."

Following these words in the prescribed form of affidavit are the words: "that the land is the —." The papers were returned to have the blank indicated filled with words further describing the character of the land, and said blanks in the affidavits now before me have been, as has already been stated, filled by the insertion of the words "second bottom land, with some sage thereon."

The blank in the prescribed form of affidavit is left in such a way that it would be difficult for an applicant or affiant to know what it is desired to have inserted. Besides, it is difficult to see how anything could be inserted which would make the affidavit stronger or more explicit than the form prescribes, omitting the blank.

Finding that all legal requirements were met in this case, so far as the application is concerned, by the declaration and the affidavits as originally filed, that is, after they were taken from the bank and unconditionally filed, I must conclude that Orr, the appellant, had made such an application as would hold and reserve for his benefit the land covered thereby, if free at the date of his application, subject, of course, to his compliance with the law, or to contest on any valid ground.

So far as his application is concerned, and that is the only question here, it is legal and valid and should be so treated.

Your office decision is accordingly reversed.

*PRACTICE—EVIDENCE; SOLDIER'S HOMESTEAD—ENTRY.***YENTSCH v. RYAN.**

Failure to make entry and settlement within six months after filing homestead declaratory statement may be excused for climatic reasons, subject however to intervening adverse claims.

On a hearing ordered to determine "priority of right," evidence as to subsequent compliance with law is not material where the party sought to be affected thereby is not offering final proof.

Acting Secretary Muldrow to Acting Commissioner Stockslager, November 29, 1887.

In the case of Alvina Yentsch v. Alzina Ryan, involving their respective homestead entries on the NW. $\frac{1}{4}$ of Sec. 34, T. 117, R. 56, Watertown, Dakota, appealed by the former from the decision of your office, dated January 6, 1886, holding her entry for cancellation, the following are the material facts:

Mrs. Ryan is the widow of a soldier who enlisted for three years in the army of the United States during the late war, and was killed in battle. On August 14, 1882, she caused her homestead declaratory statement to be filed on said tract. On September 20th following, Miss Yentsch made homestead entry, and on March 14, 1883, settled upon the same tract. On March 14, 1883, Mrs. Ryan made homestead entry, and on May 22d following settled upon said tract.

In pursuance of instructions contained in the Commissioner's letter of August 16, 1883, Miss Yentsch was notified to show cause why her entry should not be canceled, and, on September 12th following, submitted certain affidavits for that purpose, which three days afterwards were transmitted by the local land officers to the Commissioner. In pursuance of further instructions, the local officers, on October 20, 1883, notified the parties to appear before them at their office in Watertown, Dakota, on March 3, 1884, and submit evidence as to their "priority of right" in and to said land.

On the 25th of the same month Ryan gave notice that she would on November 30, 1883, make final proof (commutation) in support of her claim, and which was in accordance with said notice submitted by her. This proof was held by the local officers subject to the hearing ordered to determine the rights of the parties as aforesaid. On March 3d the parties appeared and by agreement the hearing was continued to May 1, 1884, at which time it was duly had.

The local officers found from the testimony adduced, that Yentsch established her residence on the land in dispute on March 14, 1883, and that she had made improvements, consisting of house, well, and five acres of breaking; and that Ryan had been prevented by climatic obstructions and sickness from making entry and settlement within six months from the date of filing her declaratory statement. Having so

found, they recommended that Ryan's entry remain of record and that Yentsch's entry be canceled. On appeal to you, it was held that climatic hinderances were no excuse for Ryan's entry not having been made within the six months allowed by law for that purpose; that "her entry was illegal," and that "the former register was clearly in error in allowing it where an adverse right had intervened." You held, however, that it would "be allowed to stand subject to future compliance with law," because Yentsch "has not complied with the law," and because you are "convinced she has attempted to procure the land without complying with the law."

Yentsch did not at the hearing in this case, or before that time, offer final proof in support of her claim, nor was her compliance with law, subsequent certainly to the time hearing was ordered, to wit, October 20, 1883, in issue at such hearing. This was the understanding of each of the parties. Indeed, they each, by their attorneys, objected to the introduction and consideration of any testimony introduced by the other showing residence and cultivation subsequent to May 22, 1883, as not affecting the question of "priority of right." Motions to exclude such testimony were overruled by the local officers, on the ground that they had "no power under the rules of practice to exclude testimony, unless it should appear that irrelevant matter is submitted for the purpose of entailing costs." It was ruled by the receiver, however, "that the parties confine their testimony to the matter involved in the question of priority of right to enter."

Mrs. Ryan based her claim to the land, as against the claim of Miss Yentsch, to prior right under her declaratory statement followed by actual residence established on May 22, 1883, and she made no charge that Miss Yentsch failed to establish residence within six months from the date of her entry, or that she had since abandoned the same.

The evidence shows that Miss Yentsch on March 14, 1883, moved on said tract, with the alleged intention of making it her home, and lived there till about the middle of May following, when she went away to attend on her mother, who it appears was quite sick and needed her attention; that she returned to the land sometime from the 9th to the 15th of August and remained there continuously until after she was notified of the hearing ordered in this case. She testifies that she settled upon said land with the intention of making it her home, that it is in fact her home, and that she has no other. She stands unimpeached, and this testimony as to her intention must be accepted as true.

Section 2297 of the Revised Statutes provides that, if it be proved that a homestead entryman has changed his residence from or abandoned the land for more than six months, the land so entered by him shall revert to the government, which section was amended by the act of March 3, 1881 (21 Stat., 511) as follows:

Provided, That where there may be climatic reasons, the Commissioner of the General Land Office may, in his discretion allow the settler twelve months from the date of filing in which to commence his resi-

dence on said land under such rules and regulations as he may prescribe.

Mrs. Ryan satisfactorily shows that she was prevented by climatic reasons from making entry and commencing settlement within six months from the date of her entry, and she claims the benefit of the foregoing proviso. If she is by law entitled to the benefit of this proviso, her right to the land in controversy is superior to that of Miss Yentsch's, otherwise the latter has the superior right, so far as is shown by the evidence in this case.

It will be observed that the proviso relates in express terms to cases of entry only, and that the expression "from date of filing" relates to the affidavit of qualification, which is required to be made and filed before a homestead entry is allowed. It will be further observed that the allowance of twelve months within which to commence residence is a matter of discretion in the Commissioner, "under such rules and regulations as he may prescribe."

The first rules and regulations promulgated after the foregoing proviso became a part of the law, and which relate to the question now under consideration, are found in the circular of December 15, 1882 (1 L. D., 648), which, after prescribing certain rules regarding soldiers' homestead declaratory statements, provides in paragraph five that—

The foregoing ruling will not be so construed as to require the rejection of an application to enter the tract filed upon, after the lapse of six months, where climatic reasons are shown which will justify an allowance of one year under the act of March 3, 1881; nor in cases where the failure results from sickness, misfortune, or any insurmountable cause, which shall be properly alleged and satisfactorily shown, *and where no adverse right has intervened*. Where such cause has prevented entry and an adverse right has been admitted, it will be held proper within the discretion of this office to allow an entry upon another tract.

The same provisions on this subject are found on page 23 of the general circular of March 1, 1884. These regulations were approved by the then Secretary of the Interior and are still the rule of this Department. These rules and regulations clearly preserve intact adverse rights which attach to land, filed on by a soldier, after the expiration of six month from the date of such filing and before the soldier has made entry and commenced settlement.

On March 10, 1883, Miss Yentsch made inquiries at the land office as to whether this land was still unentered, and on being informed by one of the local officers that it was, and that Mrs. Ryan's time for making entry had expired, she soon afterwards, and within the lifetime of her entry, established her residence thereon. This cut off Mrs. Ryan's right to enter this particular tract, though she would doubtless, under the circumstances shown by her testimony in this case, readily have been allowed to enter another.

For the reasons given, you will cause the said entry of Alzina Ryan to be canceled, and allow that of Alvina Yentsch to remain intact. The said decision of your office is accordingly reversed.

COAL LAND—RIGHT OF ENTRY.

ADOLPH PETERSON ET AL.

The procurement of qualified parties to make coal entries for the benefit of an association renders invalid such entries and they will not be confirmed.

The fact that the entries were made with the knowledge of certain officials in the General Land Office will not estop the Department from passing on the legality of the entries, when brought before it for action.

Acting Secretary Muldrow to Acting Commissioner Stockslager, December 2, 1887.

On the 23d of May, 1887, I granted an application filed in behalf of the entrymen and their assignee, The Trinidad Coal and Coking Company, for certification under Rules of Practice 83 and 84 of the record in coal land entries, Nos. 11 and 13, made by Adolph Peterson and John Carlson, respectively, upon the NE. $\frac{1}{4}$ of Sec. 31, and the NW. $\frac{1}{4}$ of Sec. 32, T. 33 S., R. 63 W., in the Pueblo land district, Colorado. That record, with certain other papers forwarded by your office as exhibits bearing upon the question at issue, is now before me.

An examination of said record shows the facts to be substantially as stated in the application for certiorari. As they were quite fully recited in my decision granting said application, and in your letter transmitting the record, it is not necessary to again set them out in detail.

The salient facts are, that Peterson and Carlson, who were qualified so to do, respectively made cash entry June 4, 1883, under the coal land law (Sec. 2347, R. S.), for the tracts herein described, and that final certificates issued in their names; that immediately upon making cash entry as aforesaid they conveyed by warranty deeds the lands covered by their entries to the Trinidad Coal and Coking Company. The price paid the government for the land was twenty dollars per acre, the maximum price for coal lands.

It appears that the entries were made under an agreement with the Trinidad Coal and Coking Company to convey to it, as soon as entry should be made. It also appears that it furnished the money to pay for the land at the time of entry.

The question presented for consideration is that as to the validity of the entries in the light of the facts above set forth.

Section 2347 of the Revised Statutes, under which these entries were made, provides that—

Every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall, upon application to the register of the proper land office, have the right to enter, by legal sub divisions, any quantity of vacant coal lands of the United States not otherwise appropriated or reserved by competent authority, not exceeding one hundred and sixty acres to such individual person, or three hundred and twenty acres to such association, upon payment to

the receiver of not less than ten dollars per acre for such lands, where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road.

Under section 2350 Revised Statutes, only one entry under section 2347 can be made by one person or association of persons.

Your office holds that the entries of Peterson and Carlson were in contravention of the law above cited and fraudulent, and therefore that they should be canceled.

On the other hand it is averred in behalf of the claimant and holders of the lands in question that the entries were made in accordance with the law (2347 Revised Statutes) which places no limitation or condition upon entry thereunder, except the sole limitation of acreage; that any qualified person may purchase thereunder and immediately convey his interest; that such an entry is a cash transaction, corresponding to private entry of agricultural lands, and after the terms of the law have been met, the cash paid and certificate issued, title has passed from the government and the transaction has become complete, awaiting only the issuance of patent as evidence to the world of that fact.

While admitting that the entries of Peterson and Carlson were made for the benefit of the Trinidad Coal and Coking Company, that is with the agreement to convey to it as soon as title should be acquired, it is argued that such agreement and transfer was no violation of the law either in letter or spirit.

Again, that even if this were a question of doubt, there can be no imputation of fraud, and patent should issue because the whole transaction was open and above board, with the knowledge of the local office when it received the money for the land, and of your office when it accepted waiver of appeal in certain homestead cases involving the same lands in order that the company which had purchased the lands after final homestead entry might protect itself through the coal land law.

The lands had previously been entered under the homestead law; final proof had been made and final certificates had issued. The entryman had sold the lands and such title as they had had finally lodged with the Trinidad Coal and Coking Company.

A special agent of your office, after investigation, reported the homestead entries fraudulent for failure to comply with the law, and your office upon his report held said entries for cancellation.

The Trinidad Coal and Coking Company instead of defending against this action after consultation with your predecessor, Commissioner McFarland, concluded to waive appeal, and asked the immediate cancellation of the homestead entries to enable it the sooner to secure title through the coal land law, coal having, after the homestead entries, been discovered on the land.

After such cancellation the coal entries were made June 4, 1883, as already indicated, by Peterson and Carlson. The money to pay for the

land was furnished by (and, as stated by Peterson and Carlson in affidavits made before the special agent, was actually paid by) the company, and the land was the same day on which the entries were made transferred by deed to said company.

It is clear from what has been said that, while the entries in question were nominally made by Peterson and Carlson, they were to all intents and purposes made by the Trinidad Coal and Coking Company.

The entrymen were employees of the company in its mines, or on its works, and were specially employed by it to make these entries for its benefit, which they did without any expenditure on their part, the money for the lands being actually paid by the company.

If this could be done for one or two entries, it could be done for any number. The recognition of such a practice would enable one person or corporation, operating through nominal entrymen, who are in fact mere agents to do what their principals can not legally do, to acquire under sanction of the Land Department an unlimited quantity of coal lands, or a quantity limited only by the extent of the coal field, or by the means or desires of the person or company for whose benefit they are to be made.

But the Land Department can dispose of the government coal lands only in accordance with the law, and that as to the real point involved in this case is very specific. It provides that but one entry shall be made by one person or association of persons (section 2350, R. S.), and that such entry, when made under section 2347 of the Revised Statutes, shall be limited to one hundred and sixty acres by one individual person, or three hundred and twenty acres by an association of persons severally qualified.

In the light of these provisions and limitations of the law, and of the facts in this case, I am unable to conclude that the entries made in the names of Peterson and Carlson can be recognized as legal or valid. To concede that they are would be to allow that to be done by indirection which can not be done directly. In other words, it would be to allow a corporation to acquire by purchase through agents, acting for the time being in their own names confessedly as agents, that which it cannot acquire by direct entry in its own name. This would be to encourage monopoly, while the manifest purpose of the law is to prevent monopoly. The plea or the fact that the character and purpose of the proceedings were known to certain officials of the land office prior to and at the time of the entries cannot affect the principle involved, nor estop the Department from passing upon the legality of the entries when brought before it for action.

In the case of Charles W. Filkins (5 L. D., 49), it was ruled by the Department that the allowance of an entry by the General Land Office will not preclude the Secretary from determining whether the land was legally subject to entry when the case comes up for disposition on final

proof, "and if, after a careful investigation, he concludes that an entry is illegal, that it should not have been made, he has a right and it is his duty, to say so, and direct its cancellation."

Finding after a careful consideration of the whole record and the law applicable thereto that the entries in question should not have been allowed, and that they were made in contravention of the law, I affirm the action of your office holding them for cancellation.

PRIVATE LAND CLAIM—SCRIP—PRACTICE.

DAVID DEVOR.

A petition for the re-opening of a case involving application for scrip in satisfaction of a private land claim, should be addressed to the Commissioner of the General Land Office or the surveyor general, if the case in fact is not *res judicata*.

Acting Secretary Muldrow to Messrs. Ellis, Johns & McKnight, December 6, 1887.

Your communication dated November 19, 1887, in the matter of the claim of J. F. Ellis for indemnity certificates of location in satisfaction of the private land claim of David Devor has been received and considered.

You request the re-opening of the case on the ground that my predecessor's decision (2 L. D., 403), was interlocutory, and related only to the "kind and quantity of evidence necessary to the issue of scrip"; and that said decision has since been overruled.

You make application here because, as you say, the former ruling of the Department has been applied by the Department to this case, and you therefore contend that the Department alone can say that its former decision no longer applies to this case.

If as you contend, the former decision in this case was merely interlocutory and not a final decision on the merits of the case; that the ruling therein announced no longer obtains in departmental practice; and that that decision is not binding—in other words, that the case is not *res adjudicata*—then the Commissioner of the General Land Office or the surveyor general for Louisiana, whose duty it will be to issue scrip in this case, in the event scrip is found to be due, has the same authority to declare the case still open as I have.

And inasmuch as neither of those officers has had opportunity of passing on a new application for scrip, or the renewal of the old application for the same, I must decline to say further in the case until it reaches the Department regularly in due course of appeal or otherwise.

BOUNTY LAND WARRANT—SUBSTITUTION—PATENT.

HUSSMAN *v.* BERRY.

When a valid entry is withheld from patent on account of the objectionable character of the warrant located thereon, the parties in interest may procure the issue of a patent by filing in the local office an acceptable substitute for said warrant. Where the right of substitution is dependent upon a determination as to which one of two applicants is the rightful "party in interest," and that matter can only be settled in the courts, no award of the right will be made by the Department. In such a case patent may issue in the name of the original locator and be delivered to a trustee named by the parties, on the receipt from him of the amount required and due showing of his authority to act in the matter.

Acting Secretary Muldrow to Acting Commissioner Stockslager, December 6, 1887.

In the case involving the rival claims of B. Hussman and Ruth C. Berry to make cash substitution for a certain bounty land warrant, and to secure the delivery of a patent for a tract of land on which said warrant was located, appealed by Hussman from the decision of your office in favor of Mrs. Berry, the following facts touching the issue are shown by the record.

On November 13, 1855, military bounty land warrant No. 27,911 for one hundred and twenty acres of land was issued to William Long under the act of March 3, 1855. Indorsed on this warrant is an assignment of the same to Robert Craig, dated November 28, 1855, over what purports to be the signature and seal of said Long. On May 19, 1858, the said warrant was located by Craig at the Council Bluffs, Iowa, land office, on the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, and the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ in Sec. 27, T. 83 N., R. 35 W., and a certificate of location issued to him. This certificate was subsequently placed on record in Carroll County, Iowa, where the land is situated.

Written across the face of said warrant is found the following; "Pension Office, February 1, 1864. This warrant has been this day canceled and declared void as against the United States, on account of forgery in the assignment thereof.

Wm. Helmick.

For Commissioner."

Notwithstanding this action by the Pension Office, the location made by Craig remained, and still is, uncanceled, and divers deeds of warranty to said land, before and since said action by the Pension Office, have been made and placed on record. In October 1868, the land was sold for taxes, and on December 19, 1871, the treasurer of Carroll county, Iowa, executed a tax deed for the same to James Callanan, Jr. Hussman claims title to the land through Callanan, and has been for several years in possession. Mrs. Berry claims title through Craig.

On October 11, 1883, C. A. and J. G. Berry, attorneys at law, Casey, Iowa, addressed certain inquiries in relation to the loca^on made by Craig, to the Commissioner of the General Land Office, and in answer thereto, your predecessor in office on November 12, 1883, informed them that said warrant had been canceled, but that the entry remained intact; and that "*Mr. Craig or any other person having an interest therein, may file in this office another warrant for one hundred and twenty acres duly assigned to Robert Craig as a substitute in lieu of said canceled warrant, or instead thereof, pay into this office one hundred and fifty dollars in cash. The patent will then be issued in favor of said Robert Craig.*"

On July 25, 1885, the aforesaid attorneys, then acting for William H. Durham who claimed legal title to the land under Craig, and who was the immediate grantor of said land to Ruth C. Berry, transmitted a draft for one hundred and fifty dollars to your office and requested that the patent be issued in the name of Craig and sent to them. In reply to this request, you on the 31st of the same month said:

I have to state that under a recent ruling of this office it is necessary that such substitution be made at the local office. I therefore herewith return said draft, and suggest that the one hundred and fifty dollars be paid to the receiver of the local office, now located at Des Moines, Iowa. At the same time, you will accompany such payment with this letter, for instruction to said receiver, who will make out and forward to this office in a special letter, the usual receipt in such cases The patent when issued will be in the name of Robert Craig, and when issued sent to your address.

On August 10, 1885, said attorneys presented an application to make cash substitution for said warrant, and tendered to the register of the local office, one hundred and fifty dollars in payment of said land which was refused by him because he had no authority to receive it, the office of receiver being at the time vacant. C. A. Berry, one of said firm, makes affidavit, that on the same day he saw M. D. McHenry, the present receiver of said office, and showed him your said letter of July 31st, and that McHenry then told him that he was in daily expectation of receiving his commission, and that upon its arrival he would notify him, and that he could appear and be heard in behalf of his client in relation to this matter.

On August 12, 1885, Durham, for whom said attorneys had been acting in this matter, by quit-claim deed conveyed his interest in the land to Ruth C. Berry. On September 2, 1885 Hussman was permitted by the local officers to make substitution for said warrant contrary, you state, to the special directions of the General Land Office. On October 1, 1885, said attorneys, acting for Ruth C. Berry, applied at the local office to make substitution for said warrant, and tendered to the receiver one hundred and fifty dollars for that purpose. The tender was refused, and the application denied, on the ground that substitution had already been made by Hussman.

In your office letter of February 15, 1886, to the local officers, among other directions given, you say :

You will allow said C. A. and J. G. Berry, at any time within sixty days from this date, to pay into your office, the sum of one hundred and fifty dollars as and for such substitution without any regard whatever to the payment made as aforesaid by B. Hussman, which payment has not been approved by this office. . . . The patent when issued will be in the name of Robert Craig. Thereafter any adverse claim that may exist may be settled in the proper court.

From this decision Hussman appeals, and contends that having been in possession of a part of said land for over ten years, and all of it since September, 1881, under title derived as aforesaid, and having during his occupancy built a dwelling house, cultivated and made valuable improvements thereon, he has such an *interest* therein as entitled him to make the required money substitution for said warrant—thus securing the delivery to him of the patent, to be issued in the name of Robert Craig—and that as against Ruth C. Berry, having been *first in time* in making substitution, he therefore has the superior right.

In your disposition of this matter, you expressly declined to pass upon the validity of the title of either of these parties to the land for which a patent is asked, and have only decided that the patent should issue in the name of Robert Craig, and be delivered to the attorneys of Ruth C. Berry who claims title to the land directly through said Craig.

Rule 41 of a circular issued July 20, 1875, under the authority of this Department, and still in force, respecting the location and assignment of bounty land warrants, provides that:

When a valid entry is withheld from patent on account of the objectionable character of the warrant located thereon, the parties in interest may procure the issue of a patent by filing in the office for the district in which the land is situate an acceptable substitute for the said warrant. The substitution must be made in the name of the original locator, and may consist of a warrant, cash, or any kind of scrip legally applicable to the class of lands embraced in the entry.

The award of the right of substitution to either of the parties applicant, substantially involves determining who the proper "parties in interest" are, and this in effect includes judgment as to the status of the claim made under the tax sale which matter is not within the scope of departmental action.

It is therefore apparent that the Department must under the existing circumstances decline to recognize either party as entitled to the right of substitution, and as such right must eventually be determined in the courts, patent may issue in the name of said Craig and be delivered to a trustee to be named by the parties hereto, on the receipt from such trustee of the amount required, and due showing of his authority to act in said matter.

Your decision is accordingly modified.

*RAILROAD INDEMNITY WITHDRAWAL—ENTRY.***PHILLIPS v. CENTRAL PAC. R. R. CO.**

An application to make entry though once rejected by final decision of the Department, on account of a prior railroad indemnity withdrawal, since revoked, may now be allowed, as no selection of the land was made by the company, to date from the time when the restoration takes effect.

A departmental decision, while unreversed, is binding upon all subordinate tribunals.

Acting Secretary Muldrow to Acting Commissioner Stockslager, December 7, 1887.

I have considered the case of Isaac W. Phillips v. Central Pacific Railroad Company (Oregon Branch), as presented by the appeal of the company from the decision of your office, dated February 13, 1886, holding for allowance the application of said Phillips to make homestead entry of the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 3, T. 33 N., R. 1 W., M. D. M., transmitted to your office on October 27, 1885, by the local land officers at Shasta, California.

Your office letter states that said land is within the indemnity limits of the withdrawal of October 29, 1867, made for the benefit of the California and Oregon Railroad Company, now the Oregon Branch of the Central Pacific Railroad Company, by act of Congress approved July 25, 1866 (14 Stat., 239), and also within the limits of the withdrawal on the definite location of the road ordered on August 25, 1871, and received at the local land office on September 6, same year; that prior to said withdrawals, no entry or filing had been made for said land; that on October 27, 1874, said Phillips applied to enter said tracts under the homestead laws, claiming that said land was excepted from said withdrawals, by reason of the settlement claim of one George Brown, alleged to have been made in the year 1862 and continued until November 1, 1873; that a hearing was had, and upon the evidence submitted the local land officers found in favor of the applicant; that subsequently, on appeal, the action of the local land officers was affirmed by your office, but afterwards, to wit, on March 14, 1879, the decision of your office was reversed by this Department and the application of Phillips was finally rejected.

Your office finds that the date when the township plat of survey was filed in the local land office, to wit, August 1, 1874, was erroneously stated in each of said decisions to be August 1, 1873, and you held that since the date of the filing of the township plat formed the basis in part of said departmental decision, and that date having been shown to be erroneous, "your office is justified in re-opening the case".

It is strongly insisted by counsel for the company that your office had no jurisdiction to re-open said departmental decision and hold that the same was erroneous. It will hardly be necessary to cite authorities to show that a departmental decision is binding upon all the subordi-

nate tribunals, so long as the same remains unrevoked. Higgins v. Wells (3 L. D., 21); Henry T. Wells (ibid., 196); Rancho San Rafael de la Zanja (4 L. D., 482).

The fact of a mistake in date, even if shown, may be reason for the Department to modify or revoke said decision, but it will hardly warrant your office in re-opening or disregarding a departmental decision duly rendered.

In the case at bar, however, the Department has heretofore decided that the claim of said Brown was invalid and did not serve to except said land from said withdrawals, that question must be considered finally adjudicated so far as relates to the action of this Department. But said withdrawals for indemnity purposes were revoked by departmental decision dated August 15, last, and the lands restored to settlement and entry (6 L. D., 92), and since said company did not make any selection of said tracts, there does not appear to be any good reason why said application should not be allowed to date from the time when said restoration takes effect.

The decision of your office is modified accordingly.

FINAL PROOF—TRANSMUTATION; RES JUDICATA.

UNITED STATES v. FERNANDEZ.

The publication of notice of intention to make final proof is an invitation to all the world to appear and object to the allowance of the final proof offered by the claimant.

After due notice of such intention, a pre-emptor has the right to transmute his filing to a homestead entry and submit final proof thereon the same day.

Where the name of one of the witnesses appears to have been inserted in the published notice by written interlineation, the notice is fatally defective and new proof will be required.

The approval of final proof by an examiner in the General Land Office, is not a decision of the Commissioner, that cannot be reviewed, prior to the issue of patent, by his successor in office.

Acting Secretary Muldrow to Acting Commissioner Stockslager, December 7, 1887.

I have examined the appeal of Juan Antonio Fernandez from the decision of your office dated March 24, 1887, rejecting the final proof in support of his claim for the NE. $\frac{1}{4}$ of Sec. 23, T. 33 S., R. 65 W., 6th P. M., made March 27, 1884, at the Pueblo land office in the State of Colorado.

The record shows that said Fernandez on December 19, 1883, filed in said office, his pre-emption declaratory statement No. 9,036 for said tract, upon which he alleged settlement June 15, 1878.

On the same day that said filing was made, the register of said office published a notice that said Fernandez intended "to transmute his

pre-emption filing to a homestead entry and make final proof in support of his claim, and that said proof will be made before the judge of the district court for Las Animas county, Colorado, at Trinidad, Colorado, on February 4, 1884." On the day fixed in said notice said claimant appeared at the place and before the officer designated, and made his final proof in support of his said claim. The local land officers changed said filing to homestead entry No. 3284, accepted the final proof, and issued thereon final certificate No. 1789 on March 27, 1884. The papers were duly transmitted and on November 11, 1884, the entry was approved by the examiner of your office, as appears by his endorsement upon said final certificate.

On March 24, 1887, your office, upon the recommendation of the board of review rejected said final proof, among others "because they were made, in each case, before the original entries were made" and the local land officers were advised that "this practice must be discontinued" and that "in future when cases of this kind arise you will allow the party to make original entry but refuse to accept the proof". The local land officers were further directed "to require the above party to make new proof after proper published and posted notice, and be particular in every case to see that residence has been maintained by claimants on their lands up to the time of making new proof."

From said decision of your office claimant duly appealed and assigns the following grounds of error.

(1) That said decision is erroneous because it requires claimant to make new proof in lieu of that already made which was based upon a legal filing and was made after due publication of notice, and which final proof showed continuous residence upon said tract, as well as valuable improvements thereon;

(2) Because said final proof had been approved by the Commissioner of the General Land Office on November 1884;

(3) Error in requiring new proof which shall show continuous residence from February 4, 1884, up to date of such new proof;

(4) Error in requiring new proof because the claimant gave due notice of his intention to transmute his filing to a homestead entry and make final proof in support of his claim, and in accordance with the terms of said notice his said proof was made and accepted by the local land officers;

(5) Error because said decision, in effect, nullifies the provision of the act of June 14, 1878, (20 Stat. 113) which provides for the transmutation of legal declaratory statements to homestead entries; and

(6) Error because the objection made to said proof is merely technical and does not affect the showing of good faith on the part of the claimant.

The only objection urged against said proof by your office, is, that it was made before the homestead entry was allowed.

The act of Congress approved March 3, 1877, (19 Stat. 404) provides :

That when any person who has made a settlement on the public lands under the pre-emption laws shall change his filing to that for a homestead entry, the time required to perfect his title under the homestead law shall be computed from the date of his original settlement made under the pre-emption laws.

The act of Congress approved June 14, 1878, (20 Stat. 113) provides :

That any person who has made a settlement on the public lands under the pre-emption laws, and has subsequent to such settlement changed his filing, in pursuance of law, to that for a homestead entry upon the same tract of land, shall be entitled, subject to all the provisions of law relating to homesteads, to have the time required to perfect his title under the homestead laws computed from the date of his original settlement heretofore made, or hereafter to be made, under the pre-emption laws.

By act of Congress approved March 3, 1879 (20 Stat. 472), it is provided, that before final proof shall be submitted by any homestead or pre-emption settler, the claimant shall file with the register of the proper land office a notice of intention to make such proof, giving a description of the lands claimed, and the names of the witnesses who may be called to establish the necessary facts; that upon the filing of such notice, the register shall publish a notice that such application has been made once a week for the period of thirty days in a newspaper to be by him designated as published nearest to such land, and he shall also post such notice in some conspicuous place in his office for the same period; that such notice shall contain the names of the witnesses as stated in the application; that at the expiration of said period of thirty days the claimant shall be entitled to make proof in the manner heretofore provided by law; and that the Secretary of the Interior shall make all necessary rules for giving effect to the provisions of said act.

It has been uniformly held by this Department that the publication of said notice is an invitation to all the world to appear and object to the allowance of the final proof offered by the claimant.

On April 1, 1881 (8 C. L. O., 91), your office advised F. D. Packard, Esq., Wadena Kansas, "that a person who has resided upon a tract of public land for five years under a pre-emption filing may transmute his filing to a homestead entry under acts approved March 3, 1877, and May 27, 1878, and make final proof on the same day, provided he has previously published notice of intention to do so in the manner prescribed by the act of March 3, 1879. In such cases, the notice should state that the party intends to change his pre-emption filing to a homestead entry and make final proof thereon upon the day specified in the notice".

It appears therefore that a claimant had the right under the rulings of your office, and this Department, to transmute his filing to a homestead entry and make final proof thereon the same day. *Southern Pac. R. R. Co. v. Rosenberg* (1 L. D. 400); *Swanson v. Southern Pac. R. R. Co.* (3 L. D., 285).

Since therefore, said entry was made in accordance with the departmental rulings in force, the proof if in all respect complete should not be rejected for the sole reason that it was made on the same day that the transmuted entry was allowed.

The contention that your office cannot correct errors patent upon the record, or order investigations as to the status of entries or the good faith of the entryman where entries have been approved by examiners of your office, cannot be maintained. *Robert Hall et al.* (5 L. D., 174).

The approval of the examiner is not a decision of the Commissioner that cannot be reconsidered by his successor prior to the issue of patent, when there is a patent error in the record of the entry papers. *United States v. Bayne* (6 L. D., 4).

The decision of your office rejecting said proof for the reason stated therein is erroneous, and were there no other objection to the final proof, I should feel constrained to reverse said decision and direct patent to issue on said entry. I find, however, that the notice of publication is defective in this, that the name of one of the witnesses to the final proof, Teofilo Mogues, is interlined in writing in the copy of the notice of publication. It follows, therefore, that since said notice is defective, the claimant will be required to give a new notice as required by law, and make new proof showing full compliance with law up to March 27, 1884, the date of said final certificate. *Alfred Sherlock*, (6 L. D., 155).

The decision of your office is modified accordingly.

RAILROAD INDEMNITY WITHDRAWAL—ENTRY.

CENTRAL PAC. R. R. CO. *v.* HAWKINS.

Conceding that a valid settlement could not be made on land covered by a railroad indemnity withdrawal, as the land was not selected thereunder, there is no reason why the settler may not submit proof showing compliance with law after the revocation of said withdrawal.

Acting Secretary Muldrow to Acting Commissioner Stockslager, December 7, 1887.

I have considered the case of the Central Pacific Railroad Company *v.* Benjamin F. Hawkins, as presented by the appeal of the former from the decision of your office, dated Sept. 23, 1885, allowing said Hawkins to make pre-emption entry of the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 25, and S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$, of the SE. $\frac{1}{4}$ Sec. 26, T. 35 N., R. 1 W., M. D. M., Shasta land district, in the State of California.

The record shows that the tract in the odd numbered section is within the indemnity limits of the withdrawal for the benefit of said company upon the definite location of its road which became effective on September 6, 1871; that said Hawkins filed his pre-emption declaratory

statement for said land on July 25, 1883, alleging settlement March 27, 1871; that there is no prior filing or entry of said tract and that no selection of the land has been made by said company.

On May 30, 1885, due notice was given of Hawkins' intention to make proof and payment in support of his claim, and the company was specially cited to appear and show cause why entry should not be allowed. Both parties appeared at the designated time and place. From the evidence submitted the local land officers found that said Hawkins was a qualified pre-emptor, that he planted some twenty-five or thirty trees on the land embraced in his said claim prior to August 5, 1871; that he built some fence and grubbed some of the land, but that he did not move upon the land until the month of June, 1883, and did not reside upon said land prior to the month of June, 1883; and the register and receiver concluded that since Hawkins had failed to establish a residence upon said land for a period of 12 years and 3 months after his first act of settlement upon said land, he was not entitled to make entry of said tracts; that said filing should remain intact, subject to selection by said company, as indemnity, in case the same should be required to satisfy losses within the granted limits.

Your office on September 28, 1885, considered said case, reversed the decision of the local land officers and held that the land should be awarded to the pre-emption claimant, irrespective of the fact that his claim antedated the withdrawal, because said tract is within the indemnity limits of said withdrawal.

On August 15, 1887, this Department considered the rights of said company under the withdrawal of lands made for indemnity purposes for its benefit, and directed the revocation of said withdrawal and the restoration of said lands to the public domain.

Conceding that the pre-emptor could not make a valid settlement on said land while the same was covered by said withdrawal, there does not appear to be any good reason why the pre-emptor should not be allowed to make proof in support of his claim showing compliance with the requirements of the law since the date of said restoration.

The decision of your office is modified accordingly.

DOUBLE MINIMUM EXCESS—REPAYMENT.

M. F. SOTO.

In case of double minimum excess, paid for land subsequently found not to be within the limits of a railroad grant, the excess may be repaid without waiting for the approval of the entry for patent.

Secretary Lamar to Acting Commissioner Stockslager, December 12, 1887.

Your report, dated November 2, 1887, in the matter of the application of M. F. Soto, Esq., of San Francisco, California, for the return of

double minimum excess, under the second section of the act of June 16, 1880 (21 Stat., 287), upon certain entries made at the San Francisco land office, in said State, has been received and considered.

You state that there are one hundred and five applications pending in your office for the return of double minimum excess, paid on pre-emption and commutation homestead entries; and that the land embraced in the entries aforesaid lies within the limits of a withdrawal formerly ordered for the benefit of the Atlantic and Pacific Railroad Company between San Francisco and San Buenaventura.

You have suspended said applications until the entries in question shall have been passed to patent; and you give as a reason for your action that, if it should be found upon examination of the final proof in the entries aforesaid that the entryman had sworn falsely or had acted fraudulently in the matter of his claim, then the money he may have paid for the land would be forfeited to the United States under Section 2262 of the U. S. Revised Statutes.

Your conclusion is a *non sequitur*. That part of the act of June 16, 1880 (*supra*), bearing upon the question at issue is as follows:

In all cases where parties have paid double minimum price for land which has afterwards been found not to be within the limits of a railroad land grant, the excess of one dollar and twenty-five cents per acre shall . . . be repaid to the purchaser thereof, or to the heirs or assignees.

Now the Department held, on the 23d of March, 1886 (4 L. D., 458), that the Atlantic and Pacific Railroad Company never had any grant between San Francisco and San Buenaventura. Consequently, the applications in question come clearly within the section of the act quoted. That is to say, the entrymen in question have paid two dollars and fifty cents per acre for their lands, when under the law they should have paid but one dollar and twenty-five cents per acre. One dollar and twenty-five cents is all the Department was authorized to exact from them when final proof was made; and under the law one dollar and twenty-five cents per acre is all that can be forfeited in case said entrymen have sworn falsely in the matter of their claims, or have in other respects violated the provisions of the homestead and pre-emption law. The excess of one dollar and twenty-five cents per acre can not in any event be forfeited under Section 2262, or the similar rule of the Department in commutation homestead cases.

It would seem therefore that no reason exists why said cases should remain longer in suspension. The application for the return of double minimum excess can be considered without waiting for the approval of the entry for patent.

You will therefore, in the regular course of business, take up the applications in question and adjudicate them in accordance with the law in such cases made and provided.

RAILROAD GRANT—ADJUSTMENT—SUIT TO VACATE PATENTS.

UNION PACIFIC RY. CO.

By the act of March 3, 1869, the grant in aid of the Denver Pacific was separated from that made for the benefit of the Kansas Pacific, and the adjustment of the grant for each road must therefore be made separately. It is accordingly held that lands south of the terminus of the first line at Denver, and west of the terminus of the second at the same point, should be excluded in said adjustment.

The act of June 20, 1874, was passed in the interest of commerce and transportation, having relation solely to the management and traffic of the Union Pacific system, and did not contemplate or effect any change in the grant of lands.

In accordance with the above conclusion suit is advised to vacate patents issued to the Union Pacific for lands lying within the limits indicated, in the event that said company does not reconvey said lands on demand made under the act of March 3, 1887.

The doctrine of *res judicata* is not applicable in the absence of identity of subject matter.

Acting Secretary Muldrow to Acting Commissioner Stockslager, December 7, 1887.

On September 7, 1886, there was filed in this Department the petition of H. R. Ulise *et al.*, asking that the Attorney General be requested to institute suit to set aside patents issued to the Union Pacific Railway Company for the S. $\frac{1}{2}$ of NE. $\frac{1}{4}$, S. $\frac{1}{2}$ of NW. $\frac{1}{4}$, Sec. 1, W. $\frac{1}{2}$ of Sec. 11, Sec. 3, and NE. $\frac{1}{4}$ of Sec. 9, T. 5 S., R. 69 W., Denver, Colorado, on the grounds that said lands lie outside the grant for said railroad company and branches. Said petition was referred to your office for report, and, by letter of September 20, 1886, you reported that said lands, except the S. $\frac{1}{2}$ of NW. $\frac{1}{4}$ Sec. 1, and NW. $\frac{1}{4}$ of Sec. 11, have been patented to said company, that all of said lands, with others in like situation, under a proper adjustment of the grants for the Kansas Pacific and Denver Pacific companies, respectively fall outside the limits of said grants, and recommend that suit be instituted to set aside the patents issued therefor, and that the odd-numbered sections indicated, and now vacant, be restored to entry. A plat furnished by your office, showing the proposed adjustment, by which said lands are excluded from the grant, is herewith transmitted. By reference thereto it will be seen that the grants for the Kansas Pacific and the Denver Pacific roads are adjusted separately. The present adjustment, by which said lands fall within railroad limits, was made on the basis of a continuous grant from Kansas City by way of Denver to Cheyenne. The lands embraced in your said recommendation lie southwest of Denver, south of the proposed southern terminal limit of the grant for the Denver Pacific road, west of the proposed western terminal limit of the Kansas Pacific road and within the twenty mile limit as adjusted.

The first objection raised by the company is that the question herein presented is *res judicata*. In support thereof the case of *Longan v.*

Denver Pacific Ry. Co. (1 C. L. O., 100), decided August 19, 1874, is cited. An examination of said case shows that the only issue therein presented was the title to the NW. $\frac{1}{4}$ of Sec. 3, T. 3 S., R. 69 W., Denver, Colorado. That tract is in no way affected by the question herein presented, and lies wholly outside the area of lands now under consideration. Said tract was awarded to the company, and no decision herein rendered can in any manner interfere with that judgment. I am therefore unable to find that the question now presented has become *res judicata* by virtue of said decision. Identity of subject matter is wanting. Any expression used by my predecessor in that case not pertinent to the issue must be treated as mere *dictum*.

The only other objection raised by the company is that the last clause of the act approved June 20, 1874 (18 Stat., 111), determines the issue in favor of the company.

This objection necessitates an examination of the several granting acts for the construction of said roads.

By act of Congress, approved July 1, 1882 (12 Stat., 489), the Union Pacific Railroad Company was authorized to construct a railroad from a point on the one-hundredth meridian of longitude west from Greenwich, in the Territory of Nebraska to the western boundary of Nevada Territory. The grant of lands was "every alternate section of public land, designated by odd numbers, to the amount of five (afterwards increased to ten) alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten (afterwards increased to twenty) miles on each side of said road, not sold, reserved," etc.

By section 9 of the same act the Leavenworth, Pawnee, and Western Railroad Company of Kansas was authorized to construct a railroad from the Missouri River at the mouth of the Kansas River (so as to connect with the Pacific railroad of Missouri) to said point on said one-hundredth meridian; and the Central Pacific Railroad Company of California was authorized to construct a railroad from the Pacific coast at or near San Francisco to the eastern boundary of California to connect with the Union Pacific line. Section 13 authorized the Hannibal & St. Joseph company of Missouri to extend its roads from St. Joseph via Atchison, to connect and unite with said road through Kansas. Section 14 required said Union Pacific company to construct a line of railroad from a point on the western boundary of the State of Iowa, to connect with the lines of said company at some point on said one-hundredth meridian. Council Bluffs was fixed as the eastern terminus of said road. Said section also required said company—whenever a line of railroad should be completed through Minnesota or Iowa to Sioux City—to construct a railroad from said Sioux City to connect with said branch line therein provided for. Section 15 authorized any other railroad company to connect its road with said Union Pacific line or branches.

It thus appears that the scheme of the Union Pacific act was to furnish a continuous line of railroad from the Missouri River to the Pacific Ocean, with branches extending into Minnesota, Iowa, Missouri and Kansas. In furtherance of this scheme section 12 provides that " . . . the whole line of said railroad and branches and telegraph shall be operated and used for all purposes of communication, travel and transportation, as far as the public and government are concerned, as one connected continuous line"

By act approved July 2, 1864 (13 Stat., 356), amendatory of said act of 1862, "the Leavenworth, Pawnee and Western Railroad Company, now known as the Union Pacific Railroad Company, eastern division," was required to build a line from Leavenworth to connect with its main stem at or near Lawrence.

Section 15 of said act provided: "That the several companies authorized to construct the aforesaid roads are hereby required to operate and use said roads and telegraph for all purposes of communication, travel and transportation, so far as the public and the government are concerned, as one continuous line; and, in such operation and use, to afford and secure to each equal advantages and facilities as to rates, time, and transportation, without any discrimination of any kind in favor of the road or business of any or either of said companies, or adverse to the road or business of any or either of the others. . . ."

For failure to comply with these requirements the statute fixed no penalty.

By section 13, the Burlington and Missouri River Railroad Company was authorized to extend its road through the Territory of Nebraska from the point where it strikes the Missouri River, south of the mouth of the Platte River, to connect with the main trunk of the Union Pacific road at a point not further west than said one-hundredth meridian. In this act the motive of Congress, to further extend the Union Pacific system, and to secure a uniform operation throughout, as to communication, travel, and transportation, so far as the public and the government were concerned, is still apparent.

By act approved July 3, 1866, the Union Pacific Railroad Company, eastern division, was authorized to so change the location of its line as to connect with the Union Pacific road, "but not at a point more than fifty miles westwardly from the meridian of Denver in Colorado." (14 Stat., 30).

The act of March 3, 1869 (15 Stat., 324), provided:

That the Union Pacific Railway Company, eastern division, be, and it hereby is, authorized to contract with the Denver Pacific Railway and Telegraph Company, a corporation existing under the laws of the Territory of Colorado, for the construction, operation, and maintenance of that part of its line of railroad and telegraph between Denver City and its point of connection with the Union Pacific Railroad, which point shall be at Cheyenne, and to adopt the road-bed already graded by said

Denver Pacific Railway and Telegraph Company as said line, and to grant to said Denver Pacific Railway and Telegraph Company the perpetual use of its right of way and depot grounds, and to transfer to it all the rights and privileges, subject to all the obligations pertaining to said part of its line.

Sec. 2. *And be it further enacted*, That the said Union Pacific Railway Company, eastern division, shall extend its railroad and telegraph to a connection at the city of Denver, so as to form with that part of its line herein authorized to be constructed, operated, and maintained by the Denver Pacific Railway and Telegraph Company, a continuous line of railroad and telegraph from Kansas City, by way of Denver to Cheyenne. And all the provisions of law for the operation of the Union Pacific Railroad, its branches and connections, as a continuous line, without discrimination, shall apply the same as if the road from Denver to Cheyenne had been constructed by the said Union Pacific Railway Company, eastern division: but nothing herein shall authorize the said eastern division company to operate the road or fix the rates of tariff for the Denver Pacific Railway and Telegraph Company.

Sec. 3. *And be it further enacted*, That said companies are hereby authorized to mortgage their respective portions of said road, as herein defined, for an amount not exceeding thirty-two thousand dollars per mile; to enable them respectively to borrow money to construct the same; and that each of said companies shall receive patents to the alternate sections of land along their respective lines of road, as herein defined, in like manner and within the same limits as is provided by law in the case of lands granted to the Union Pacific Railway Company, eastern division: *Provided*, That neither of the companies hereinbefore mentioned shall be entitled to subsidy in United States bonds under the provisions of this act.

This act clearly separates the grant of lands for the Denver Pacific line, from that in aid of the eastern division of the Union Pacific Company.

The Denver Pacific Railway and Telegraph Company was incorporated on November 19, 1867, under the general laws of the Territory of Colorado, and proceeded to survey and grade a line of railroad between Denver and Cheyenne. By the act under consideration the Union Pacific Railway Company, eastern division, was required to construct its road westwardly to Denver. That city was made the terminus of the line *to be constructed* by said company. From Denver north to Cheyenne the Denver Pacific Company was authorized to build the road under contract with said Union Pacific Company, eastern division. The act provides "that each of said companies shall receive patents to the alternate sections of land *along their respective lines* of road." The lands in question do not lie along the line of either of said roads. They are west of the terminus of the Union Pacific eastern division road, and south of the terminus of the Denver Pacific. I am therefore of opinion that the lands in question are not embraced within the grant.

Nor is this conclusion in any way affected by said act of 1874, as contended by the company. That act in no way alters or contemplates the grant of lands. The act is entitled "An act making additions to the

fifteenth section of the act approved July 2, 1864," etc. It provides that there be added to said section the following:

And any officer or agent of the companies authorized to construct the aforesaid roads, or of any company engaged in operating either of said roads, who shall refuse to operate and use the road or telegraph under his control, or which he is engaged in operating for all purposes of communication, travel, and transportation, so far as the public and the government are concerned, as one continuous line, or shall refuse, in such operation and use, to afford and secure to each of said roads equal advantages and facilities as to rates, time, or transportation, without any discrimination of any kind in favor of, or adverse to, the road or business of any or either of said companies, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not exceeding one thousand dollars, and may be imprisoned not less than six months. In case of failure or refusal of the Union Pacific Railroad Company or either of said branches, to comply with the requirements of this act and the acts to which this act is amendatory, the party injured or the company aggrieved may bring an action in the district or circuit court of the United States in the Territory, district, or circuit in which any portion of the road of the defendant may be situated, for damages on account of such failure or refusal; and, upon recovery, the plaintiff shall be entitled to judgment for treble the amount of all excess of freight and fares collected by the defendant, and for treble the amount of damages sustained by the plaintiff for such failure or refusal; and for each and every violation of or failure to comply with the requirements of this act, a new cause of action shall arise; and in case of suit in any such Territory, district, or circuit, process may be served upon any agent of the defendant found in the Territory, district, or circuit in which such suit may be brought, and such service shall be by the court held to be good and sufficient; and it is hereby provided that for all the purposes of said act, and of the acts amendatory thereof, the railway of the Denver Pacific Railway and Telegraph Company shall be deemed and taken to be a part and extension of the road of the Kansas Pacific Railroad, to the point of junction thereof with the road of the Union Pacific Railroad Company at Cheyenne, as provided in the act of March third, eighteen hundred and sixty-nine. (18 Stat., 111.)

Said section fifteen (above quoted) relates solely to the management and traffic of said Union Pacific road and its branches, and requires that the road and all its branches shall be operated as a continuous line.

After the passage of the act of 1864 it was found that the Union Pacific road and its branches violated the provisions of said section fifteen; discriminations in rates arose, and rates over the Denver Pacific became so grievous as to cut off Omaha and shipping towns on the Union Pacific from access to the city of Denver. To cure *these abuses* the act of 1874 was passed, and a penalty was prescribed for failure to comply with said section fifteen. Resort to the courts of the United States was authorized, and the complainant, upon recovery, was awarded an amount in treble his damages. The last clause of the act merely places the Denver Pacific road, which had not been mentioned in the act of 1864, in the same relation as all other branches of the Union Pacific.

The act throughout had relation to the management and tariffs of the Union Pacific system, just as said section fifteen, of which it is an amendment; and did not contemplate or effect any change in the grant of lands. The act was passed in the interest of commerce and transportation. To determine the extent of the land grant recourse must be had to said act of 1869.

For these reasons, I am of opinion that the lands in question are not included within the grants for said roads, and concur in the recommendation of your office that suit be instituted to set aside patents issued therefor.

By joint resolution of March 3, 1869 (15 Stat., 348), the Union Pacific Railroad Company, eastern division, was authorized to change its name to the "Kansas Pacific Railway Company." Afterwards, on January 24, 1880, the Union Pacific Railroad Company, the Kansas Pacific Railway Company and the Denver Pacific Railway and Telegraph Company consolidated, and formed the Union Pacific Railway Company.

Since your said recommendation, the act of March 3, 1887 (24 Stat., 556), was passed. That act provides:

That the Secretary of the Interior be, and is hereby authorized and directed to immediately adjust, in accordance with the decisions of the supreme court, each of the railroad land grants made by Congress to aid in the construction of railroads and heretofore unadjusted.

Sec. 2. That if it shall appear, upon the completion of such adjustments respectively, or sooner, that lands have been, from any cause, heretofore erroneously certified or patented, by the United States, to or for the use or benefit of any company claiming by, through, or under grant from the United States, to aid in the construction of a railroad, it shall be the duty of the Secretary of the Interior to thereupon demand from such company a relinquishment or reconveyance to the United States of all such lands, whether within granted or indemnity limits; and if such company shall neglect or fail to so reconvey such lands to the United States within ninety days after the aforesaid demand shall have been made, it shall thereupon be the duty of the Attorney-General to commence and prosecute in the proper courts the necessary proceedings to cancel all patents, certification, or other evidence of title heretofore issued for such lands, and to restore the title thereof to the United States.

Under said section two it becomes necessary to demand from said company a reconveyance to the United States of all of said lands patented to said company within the area under consideration.

You will accordingly make such demand, and at the end of ninety days therefrom report the result to this Department.

Odd sections within said area not certified or patented to said company will be restored to entry in accordance with existing laws and regulations.

PRACTICE—RULE 48; PRE-EMPTION—FILING.

OSMUNDSEN *v.* McDONALD.

A decision of the local office contrary to law, should be reversed by the Commissioner, in the absence of appeal, under the second exception to Rule 48 of Practice.

The prior settlement of a pre-emptor, who fails to file in time, is not protected as against the next settler in point of time who has complied with the law.

Acting Secretary Muldrow to Acting Commissioner Stockslager, December, 12, 1887.

I have before me the appeal of Angus McDonald from your office decision of January 27, 1886, holding for cancellation his declaratory statement for the NE. $\frac{1}{4}$, Sec. 18, T. 132 N., R. 55 W., Fargo district, Dakota.

It appears that on June 15, 1882, before the filing of the township plat, McDonald settled on the land in question; that on November 29, 1882, the township plat was filed at the local office; that on February 13, 1883, Olans Osmundsen made homestead entry for the tract in question; that on June 12, 1883, McDonald filed declaratory statement not for said N. E. $\frac{1}{4}$, the tract in controversy, but for the NW. $\frac{1}{4}$ of the same section, alleging settlement as above mentioned; that on August 17, 1887, by permission of your office, he, the said McDonald, amended his filing by a new declaratory statement covering the NE. $\frac{1}{4}$ the tract in controversy; that on November 5, 1883, McDonald submitted final proof under his filing, Osmundsen protesting; that upon this protest the local office ordered a hearing which was afterwards duly had, and in consequence of which the local officers rendered a decision finding that McDonald had "made the first legal settlement on the premises in question", and had "followed said settlement with improvements thereon in due time", but that he had "never resided upon the land as sworn to in his offered proof and that he had never resided thereon for six months continuously nor any more than a few days consecutively, now and then", and holding, as matter of law, that McDonald was "entitled to perfect his residence by virtue of having made prior settlement and that if he should do so and make proof and payment within the thirty-three months allowed by the pre-emption laws Osmundsen's homestead entry should be canceled, but that if McDonald should fail to comply with the requirements of the pre-emption laws within said time, then that his declaratory statement should be canceled and Osmundsen's homestead entry be allowed to stand"; that due notice of this decision was given to the parties, and the usual time allowed for appeal; but that no appeal was taken by either side.

Upon this record your office held that "under Rule 48 of practice, (the local officers') decision had become final as to the facts," but that "from a review of the record in the case," it appeared "that although McDonald made the prior settlement and improvement at the time alleged, yet he utterly failed to make any attempt to comply with the requirements of the law as to residence until just before he made his proof, which was months after the homestead entry of Osmundsen; further; that he was engaged at his trade, away from the tract; and once in a while before he made his proof he would make mere visits to the tract to keep alive the fiction of residence;" "further, that Osmundsen made his entry at time alleged; began his residence with his family in a good house; which he put upon the tract, within the time required, and that as far as he had gone he had complied with the requirements of the homestead law;" accordingly you ordered that the filing of McDonald be held for cancellation, his final proof rejected, and the homestead entry of Osmundsen held intact.

It is to be noted that McDonald did not file even his first (and incorrect) declaratory statement until June 12, 1883, or more than six and one-half months after the filing of the township plat, nearly a year after his settlement, and four months after Osmundsen's homestead entry. Even, therefore, if the "amendment" of the filing, to make it cover the tract in controversy can be allowed to take effect as of the original date, even against an adverse claimant, it must still remain true that McDonald's prior settlement was not followed up by the filing of a declaratory statement within three months after the filing of the township plat. This being so, his settlement, though prior, cannot avail him as against "the next settler in point of time, who has complied with the law" (2265 Rev. Stat., *Watts v. Forsyth*, 5 L. D., 624).

It is apparent, accordingly, that it was error in law to decide that McDonald had the superior right, and that, under the second exception to Rule 48, even though Osmundsen did not appeal, the local officers' decision was properly reversed, as being "contrary to existing laws and regulations. (*Watts v. Forsyth*, 5 L. D., 624, citing *Bushnell v. Burr*, 5 L. D., 212.)

This being conclusive of the case, it is unnecessary to decide whether the testimony as to the alleged residence of McDonald upon the tract, would so far justify a charge of *mala fides* upon his part, as to support a cancellation of his filing upon that ground.

The decision of your office is accordingly affirmed.

COAL LANDS—"KNOWN MINES"—PRE-EMPTION.

NICHOLAS ABERCROMBIE.

To constitute the exemption contemplated by the pre-emption law under the head of "known mines," there should be upon the land, at the time of sale, ascertained coal deposits of such extent and value as to make the land more valuable to be worked for the coal, under the conditions then existing, than for agricultural purposes.

A change of condition occurring after sale whereby new discoveries are made, or by means whereof it may become profitable to work the land for its coal, cannot affect the title as it passed at the time of the sale.

Suit to vacate patent will be instituted if it appears that the final proof was false and fraudulent.

Acting Secretary Muldrow to the Attorney General, December 12, 1887.

Inclosed herewith you will please find a communication from the Hon. Acting Commissioner of the General Land Office to this Department dated December 3, 1887, recommending that suit be instituted to set aside a patent issued April 9, 1878, on final homestead entry No. 752, of the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 2, T. 17 S., R. 3 W., made January 14, 1876, by Nicholas Abercrombie, at the Montgomery land office, in the State of Alabama.

Said communication alleges that "the land is agricultural mineral land;" that the claimant entirely failed to comply with the requirements of the homestead law and that said land was not subject to entry under the homestead law, by reason of its mineral character.

With said communication are transmitted copies of the entry papers of said entry, of the report of the special agent investigating said entry, and also of the *ex parte* affidavits of three witnesses tending to sustain the allegations of the special agent as to the failure of the claimant to comply with the requirements of the homestead law as to residence, improvement and cultivation of the land.

It does not appear that the land in question was returned on the township plat of survey as mineral land, and hence it was *prima facie*, subject to entry under the homestead laws.

The report of the special agent and the *ex parte* affidavits filed therewith, do not show that said land was mineral land at the date of said entry, so as to except it from entry under the homestead laws. The special agent says that "there are five different veins of coal cropping out on the adjoining section and from the dip they are supposed to extend through this entry." Only one of the witnesses mentions the fact that there is evidence of coal on the land. He states that "there are five veins of coal on it ranging from seven to two and one-half feet thick." This is altogether too indefinite to warrant the conclusion that said land was coal land and not subject to entry.

In *Diffeback v. Hawke* (115 U. S. 392) the supreme court held that no title from the United States to land known at the time of sale to be

valuable for its minerals of gold, silver, cinnabar, or copper could be obtained under the pre-emption or homestead laws, or the town site laws, or in any other manner than as prescribed by the laws specially authorizing the sale of such land, except in certain States therein specially mentioned. The court said (page 404):

We say land known at the time to be valuable for its minerals, as there are vast tracts of public land in which minerals of different kinds are found, but not in such quantities as to justify expenditures in the effort to extract them. It is not to such lands that the term mineral is applicable We therefore use the term known to be valuable at the time of sale to prevent any doubt being cast upon titles to lands afterwards found to be different in their mineral character from what was supposed when the entry of them was made and the patent issued.

The supreme court also held in the case of the Colorado Coal and Iron Co. *et al. v. United States*, decided November 21, 1887, that it is not sufficient to constitute "known mines" of coal within the meaning of the statute, that there should merely be indications of coal beds or coal fields of greater or less extent and of greater or less value, as shown by the outcroppings; that to constitute the exemption contemplated by the pre-emption act of 1841 under the head of "known mines," there should be upon the land ascertained coal deposits of such an extent and value as to make the land more valuable to be worked as a coal mine under the conditions existing at the time, than for merely agricultural purposes; that the fact that there are surface indications of the existence of veins of coal does not constitute a mine, nor does it prove that the lands will ever be, under any conditions, sufficiently valuable on account of its coal deposits to be worked as a mine; that a change in the conditions occurring subsequently to the sale, whereby new discoveries are made, or by means whereof it may become profitable to work the veins as mines, cannot affect the title as it passed at the time of the sale; and that if upon the land at the time of the sale there were not actual "known mines" capable of being profitably worked for their product, so as to make the land more valuable for mining than for agriculture, a title to them acquired under the pre-emption act could not be successfully assailed.

Tested by the rule prescribed by the supreme court as above set forth, it is apparent that there is not sufficient testimony to warrant the conclusion that the land covered by said entry was not subject to entry under the homestead laws. While this is true, yet, if as is averred by the affiants, the claimant never resided upon said land at all then, unquestionably, his final proof was false and fraudulent, and for that reason the United States would be justified in bringing suit to vacate said patent. I, therefore, have the honor to request that you will direct the proper officer to cause a suit to be duly instituted for the purpose of setting aside said patent, if, after investigation, it shall be considered that such suit can be successfully maintained.

SUIT TO VACATE PATENT—TRANSFEREE.

WILLIAM W. WILSON.

Suit to vacate patent, obtained by fraudulent proof as to compliance with law, will not be advised where it appears that the land has passed into the hands of a transferee, in the absence of evidence that such transferee had knowledge of the fraudulent character of the final proof.

Acting Secretary Muldrow to Acting Commissioner Stockslager, December 12, 1887.

I am in receipt of your communication dated the 3rd inst., recommending that the Hon. Attorney General be requested by me to direct the proper officer to institute legal proceedings to have set aside the patent issued on March 30, 1885, upon final homestead entry of the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, and the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 32, T. 6 S., R. 18 W., made October 26, 1883, by Wm. W. Wilson at the Las Cruces land office in the Territory of New Mexico.

In said communication it is stated "that the entryman did not in any respect comply with legal requirements, for he did not pretend to live upon, improve or cultivate said land until nearly two years after final proof"; that said entry was patented March 30, 1885, and the land was bought by the "Nathan Hall Cattle Company" in August 1886; that Nathan Hall has been connected with a number of fraudulent cases in New Mexico; that, while there is no positive evidence that Hall was cognizant of Wilson's fraud, yet it is positively asserted that the facts were the common talk of the neighborhood, where said land was sold, and Hall "could have learned all of the fact if he had desired to". That Wilson "was under indictment for perjury at the time he sold, and left the Territory in disguise as soon as he got his money. Such facts could not have been unknown to purchaser".

The copy of the report of the special agent states that said land is now owned by Nathan Hall, who purchased from said Wilson in August 1886; that claimant never pretended to reside upon said land until two years after final certificate was issued; that he had a wife and two children, was well known in the neighborhood, and both he and his neighbors knew that he was not residing upon his homestead; that four witnesses, whose names are given, will testify to claimant's non-residence, and failure to improve the land until after patent was issued; that "said claimant has been indicted. He disguised himself and left the Territory in August 1886"; that the citizens living near said entry were satisfied that Hall was cognizant of the fraudulent character of said entry, but that said agent was unable to obtain any positive proof to that effect.

The special agent submits the affidavits of two witnesses in support of his allegations. In the first, it is alleged that the affiant had been

living in the vicinity for six years, that he knew the claimant and knew where the land covered by said entry was situated; that the claimant never lived on said land a single day after he made his final proof; that claimant never improved said tract at all until two years after he made final proof; that "he sold his place and stock to Nathan Hall for ten thousand dollars"; that affiant does not know how much he got for his place and cannot say "that Nathan Hall knew that said Wilson was not living on his homestead, but it was common talk in the country that the entry was illegal." The second affidavit states, that the affiant has lived in the vicinity of said land since September 1883, only one month prior to the date of final proof; that he became acquainted with claimant soon after said date, and is familiar with the land in question; that the affiant was then living in the house occupied by said claimant from the time he became acquainted with him in 1883, until he moved on to his homestead entry in 1885; that "this house is in T. 6 S., R. 17 W., on unsurveyed land and is at least one hundred and seventy five yards from the nearest point of Wilson's homestead entry"; that when affiant "informed Wilson that he was not living on his entry he replied that he knew it already"; that while Wilson lived on this unsurveyed tract he opened an acequia through a portion of his homestead entry for the purpose of irrigating this tract which he was then cultivating, and this was the only improvement made upon his homestead entry until he moved on to it, October 1885; that claimant then fenced in about 15 acres, six of which he cultivated and pastured the remainder; that he lived on his said homestead from October 1885, until August 1886, when he moved, with his wife, to Ohio; and that before he moved he sold his homestead and cattle to said Hall, but affiant does not know how much he received nor the exact day that he sold said land.

From the foregoing it is apparent that the showing made is entirely insufficient to warrant the conclusion that even, if said claimant failed to comply with the requirements of the homestead law, and made false and fraudulent final proof, the character of the entry was known to the purchaser Hall.

The United States supreme court, in the case of *The Colorado Coal and Iron Company et al. v. The United States*, (123 U. S. 307) in an exhaustive opinion delivered by Mr. Justice Mathews, has clearly indicated the measure of proof required to warrant the cancellation of a patent in the hands of the original claimant, as also in the hands of a bona fide purchaser without notice.

The United States circuit court in said case, held that the charge in the bill, that the supposed pre-emptors and patentees were fictitious persons having no existence was sufficiently proved that consequently, there being no grantees, no legal title passed from the United States, and that as the defendants acquired no legal title by virtue of the supposed conveyance to them they cannot claim protection as *bona fide* purchasers for value without notice of the fraud (18 Fed. Rep., 273).

But, on appeal, the supreme court held that it was not sufficiently proven that the pre-emptors and patentees were fictitious persons; that it was—

Fully established that there were in fact no actual settlements and improvements on any of the lands as falsely set out in the affidavit in support of the pre-emption claims and in the certificates issued thereon. This undoubtedly constituted a fraud upon the United States sufficient in equity as against the parties perpetrating it, or those claiming under them with notice of it, to justify the cancellation of the patents issued to them. But it is not such a fraud as prevents the passing of the legal title by the patents. It follows that to a bill in equity to cancel the patents upon these grounds alone the defence of a bona fide purchaser for value without notice is perfect.

The court quotes with approval from the opinion delivered in the case of the United States *v.* Minor (114 U. S., 233) that, "where the patent is the result of nothing but fraud and perjury, it is enough to hold that it conveys the legal title, and it would be going quite too far to say that it cannot be assailed by a proceeding in equity and set aside as void if the fraud is proved and there are no innocent holders for value."

Speaking of the degree and character of proof required to invalidate titles held by purchasers in good faith for value, the court quotes from the Maxwell Land Grant case (121 U. S., 325).

The deliberate action of the tribunals to which the law commits the determination of all preliminary questions, and the control of the processes by which this evidence of title is issued to the grantee, demands that, to annul such an instrument and destroy the title claimed under it, the facts on which this action is asked for must be clearly established by evidence entirely satisfactory to the court, and that the case itself must be entirely within the class of causes for which such an instrument may be avoided. . . . We take the general doctrine to be, that when in a court of equity it is proposed to set aside, to annul, or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, patents, and other solemn evidences of title emanating from the government of the United States under its official seal? In this class of cases the respect due to a patent, the presumptions that all the preceding steps required by the law had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments demand that the effort to set them aside, to annul them, or to correct mistakes in them should only be successful when the allegations on which this is attempted are clearly stated and fully sustained by proof. It is not to be admitted that the titles by which so much property in this country and so many rights are held, purporting to emanate from the authoritative action of the officers of the government, and, as in this case under the seal and signature of the President of the United States himself, should be dependent upon the hazard of successful re-

sistance to whims and caprices of every person who chooses to attack them in a court of justice; but it should be well understood that only the class of evidence which commands respect, and that amount of it which produces conviction shall make such an attempt successful.

It has been uniformly held by this Department and by the courts, that when it is sought to cancel an entry or annul a patent for fraud, the burden is upon the attacking party. George T. Burns (4 L. D., 62), Blackstone Commentaries (Vol. 3, p. 303), 9 Peters 691. The Colorado Coal and Iron Company (*supra*).

In the light of the principles enunciated by the supreme court, as above set forth, it is evident that the showing made by the government is insufficient even to put the transferee upon his defence. The *ex parte* affidavits do not allege positively that Hall knew that Wilson's proof was fraudulent. Indeed, it is not clearly shown that Wilson knew that his house was not on his homestead entry at the date when he made final proof. It is shown, however, that it was on unsurveyed land and about one hundred and seventy-five yards from the homestead entry. If he actually believed that his house was on the land covered by his homestead entry, the fact that it was afterwards discovered to be outside of the line would not of itself necessarily vitiate his entry. Since upon the showing made by the special agent, there must be very grave doubts that Hall had any knowledge of the fraudulent proof made by Wilson—if the same was fraudulent—I am of the opinion that neither the interests of the government nor justice require that legal proceedings should be instituted for the purpose of vacating said patent, and for the reasons herein stated I therefore must decline to request the Honorable Attorney General to direct the institution of a suit to annul said patent.

TIMBER CULTURE ENTRY—REPAYMENT.

CHARLES F. COFFIN.

On the cancellation of an entry made for land not subject thereto, by reason of a natural growth of timber, repayment will not be allowed where the entryman without examination of the land or knowledge of its condition made oath that the land was devoid of timber.

Acting Secretary Muldrow to Commissioner Sparks, July 21, 1887.

I have considered the appeal of Charles F. Coffin from the decision of your office, dated October 10, 1885, refusing his application to have his timber culture entry No. 2221 of the E. $\frac{1}{2}$ of the NE $\frac{1}{4}$, and the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 24, T. 136 N., R. 76 W., canceled without prejudice. Said entry was made August 15, 1884, at the Bismarck land office, Dakota Territory.

The applicant avers in his said application that when he made said entry he was informed by parties who had made an examination of the

land, that it was devoid of timber, and he believed that it was subject to entry under the timber culture law; that he has since learned that said section contains "a body of young and thrifty timber estimated to contain some ten acres"; that he is informed and believes that by reason of the timber thereon, said entry is illegal and void; and he asks that his entry be canceled without prejudice, and that the fees and commissions paid thereon be returned to him.

On May 19, 1885, your office directed the local land officers to inform the applicant that his application was too "vague and unintelligible," and that he must furnish a supplemental affidavit, stating the number, size and kind of trees growing, and where they are situated; also whether he has made any contract or agreement toward a disposition of the tract in question."

The local land officers transmitted to your office the affidavit of the attorney who prepared said application, stating that the applicant was away from the Territory, but that the applicant told said attorney that he had not entered into any contract relative to said tract. On August 15, same year, your office refused to accept said affidavit of said attorney as sufficient, and suspended action on the case.

On September 12, 1885, the register transmitted to your office the affidavit of the applicant made in Cook county, Illinois, on the 7th of the same month, averring that he has "not relinquished, sold, or transferred, or agreed to relinquish, sell or transfer in any manner," his right to said land. On October 10, 1885, your office refused the application upon the evidence submitted by the applicant, and held that until he furnishes undisputed proof from his own personal knowledge that there is a natural growth of timber upon said tract, his request will not be further considered.

From the foregoing, it would seem that upon the showing made, said entry should be canceled. The claimant alleges that his entry is illegal and furnishes the affidavits of two witnesses to sustain his allegation. The question whether claimant can enter another tract under said act should not be considered until he has made application for some particular tract. Fremont S. Graham (4 L. D., 310.)

It is apparent that the application for repayment of fees and commissions must be refused. The claimant made affidavit that said land was devoid of timber, without any examination or knowledge of its condition and hence he can not be permitted to take advantage of his own negligence.

It is clear that said timber culture entry should be canceled. The right of entry of another tract will be duly considered when the claimant files his application for some particular tract.

The decision appealed from is modified accordingly.

*RAILROAD GRANT—JOINT RESOLUTION OF MAY 31, 1870.***NORTHERN PAC. R. R. CO. v. McRAE.**

By the joint resolution of May 31, 1870, there was conferred upon the Northern Pacific a grant of lands for the line of its road from Portland to Puget Sound.

Secretary Lamar to Commissioner Sparks, September 30, 1887.

The sole issue presented in this case is whether the Northern Pacific Railroad Company has a grant of lands for the line of its road from Portland to Puget Sound.

On March 21, 1884, Donald McRae made application to enter the SE. $\frac{1}{4}$ of SW. $\frac{1}{4}$, Sec. 5, T. 20 N., R. 3 E.; W. M., Olympia, Washington Territory, and on April 2, 1884, James L. Brooks presented his application with tender of fees to locate Porterfield scrip on said tract.

Both applications were rejected by the local officers, because said tract is within limits of withdrawal for the benefit of said road.

As shown by the record—and stated in your decision—the tract in controversy is within the limits of a withdrawal ordered August 13, 1870, on filing of map of general route of the line of road from Columbia River to Puget Sound; that a map of definite location for said portion of the road was filed December 8, 1874, and that at said date the tract in controversy was free from pre-emption, homestead or other claim of right.

You reversed the action of the local office solely upon the ground that, “the company has no grant of lands for that portion of its road from or at a point in the valley of the Columbia river at or near Portland, Oregon, to Puget Sound in Washington Territory.”

As stated in your letter, the decision of this case, so far as the company is concerned, depends upon whether it has a grant of lands for the line of road from a point at or near Portland, Oregon, to Puget Sound.

The act of July 2, 1864 (13 Stat., 365), granting lands to the Northern Pacific Railroad Company to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, with a branch line by way of the valley of the Columbia River to a point at or near Portland in the State of Oregon, granted to said road every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State.

By joint resolution of April 10, 1869 (16 Stat., 57), said company was “authorized to extend its branch line from a point at or near Portland, Oregon, to some suitable point on Puget Sound, to be determined by said company, and also to connect the same with its main line west of the Cascade Mountains in the Territory of Washington: Provided that

said company shall not be entitled to any subsidy in money, bonds, or *additional lands* of the United States, in respect to said extension of its branch line as aforesaid, except such lands as may be included in the right of way on the line of such extension as it may be located."

Nothing was done by the company under this resolution, nor is there anything to show that the company ever accepted it, either expressly or by implication.

On May 31, 1870 (16 Stat., 378), Congress passed another joint resolution authorizing said road—

To locate and construct, under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its main road to some point on Puget Sound, *via* the valley of the Columbia river, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound; and in the event of there not being in any State or Territory in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such State or Territory, within ten miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency, on said main line or branch, except mineral and other lands as excepted in the charter of said company of eighteen hundred and sixty-four, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of subsequent to the passage of the act of July two, eighteen hundred and sixty-four.

By this resolution the designations of the lines of the road were changed; that which by the granting act was known as the branch line ("via the valley of the Columbia river to a point at or near Portland in the State of Oregon") was changed to "main road," or "main line," and that which had been designated as main line (across the Cascade Mountains to Puget Sound) was changed to branch line.

So by the joint resolution of 1870 the Company was authorized to locate and construct its main line *via* the valley of the Columbia river, through some point at or near Portland, Oregon, to a suitable point on Puget Sound, with the *privileges, grants, and duties* provided for in its act of incorporation.

Now, the grant provided for in its act of incorporation is every alternate section of public land not mineral (except coal and iron) designated by odd numbers to the amount of twenty alternate sections per mile on each side of said railroad line, through the Territories of the United States, and ten sections per mile on each side of said railroad whenever it passes through any State.

I am clearly of the opinion that by the joint resolution of May 31, 1870, Congress intended that the grant of twenty sections per mile on each side of the road to aid in the construction of said road should be extended to the whole line of the road including that part of the main line

via the valley of the Columbia river through Portland to Puget Sound. This conclusion based alone upon the language of the joint resolution would be confirmed, if confirmation was necessary, by the debates in Congress upon said resolution while it was pending and make clear the manifest purpose of said resolution.

In the course of the debate Senator Howard said :

It asks no more at the hands of Congress, as I said before, than what is promised to them in their original charter of 1864—not a single acre, I repeat, with the exception of the new donations upon the line from Portland to Puget Sound, which is authorized by this resolution. That line from Portland to Puget Sound was not embraced in the original charter. It was authorized and the right of way given to this company at the last session of Congress (Joint Resolution of April 10, 1869), but simply the right of way and no lands to enable the company to build it. On that line, and on that alone, are lands required additional to those contemplated in the original charter. Cong. Globe, 41 Congress, 2d Sess., page 2546.

As reported from the Committee, the resolution contained this language: "Under the provisions and with the privileges and duties provided for in its act of incorporation and amendments thereto" (page 1584).

During the debate in the Senate Mr. Howard said: "I now move to strike out in the fifteenth line the words 'and the amendments thereto,' so as to make it sure that this new line, which is to pass from Portland to Puget Sound, will be entitled to the subsidy in lands; otherwise it might leave it very uncertain." The amendment was agreed to (page 2583). Subsequently, Senator Howard moved to amend the sentence, "under the provisions and with the privileges and duties provided for in its act of incorporation," by inserting after the word "privileges," the word "grants," saying "so as to remove any ambiguity that might arise."

In the House—in reply to the question, How much additional land will be granted should this bill become a law?—Mr. Wheeler said :

That depends upon the fact whether the lines will be longer than the original ones. This can only be determined by actual survey. If more land is taken it will be only for the additional distance and for the quantity per mile granted by the charter. (Page 3263.)

Mr. Wilson said :

"This is no increase of land over that which has already been given to this road. It only gives them additional land for an additional piece of road, which they now propose to construct from Portland up to Puget Sound. The old grant is not increased one acre." (Page 3266.)

I am clearly of the opinion that the Northern Pacific Railroad Company has a grant of lands from Portland to Puget Sound (Tacoma), and your decision is therefore reversed.

ADJUSTMENT OF STATE GRANTS—AGENT—ATTORNEY.

THE STATE OF CALIFORNIA.

In adjusting Congressional grants of land to a State, the executive officers of the United States have no jurisdiction to review transactions between the State and its purchasers, or between the State and its locating agents, and determine whether such purchasers or agents have complied with the State law relative to the sale of such lands.

The surveyor-general of California is the duly authorized agent of that State in the adjustment of the school grant.

The surveyor-general of California has authority to appoint an attorney to represent the State, and to revoke such appointment, unless the power conferred thereby is coupled with an interest.

The claim of an attorney to a power coupled with an interest cannot be recognized in the case of one who represents alleged derivative claimants of the State, when the want of good faith in such claims is apparent from the record.

Secretary Lamar to Acting Commissioner Stockslager, December 12, 1887.

This case arises upon motion by the attorneys for the State surveyor general of California to dismiss the appeal filed on behalf of James T. Stratton, claiming to represent the State, from your office decision dated February 28, 1885, cancelling certain indemnity school selections in T. 12 N., R. 1. E., H. M., Humboldt, California.

To arrive at a correct understanding of the merits of this case, the following recital of facts is deemed necessary.

August 6, 1883, application was made by the State to select as indemnity school land sections 23, 26, and 35 in township above named. Such application was rejected by the local officers because their records showed that said lands had been previously applied for under the timber and stone act of June 3, 1878. Appeal from that action was taken by James T. Stratton on behalf of the State. November 18, 1884, your office directed the local officers to receive and allow such selections, subject to the rights of the prior applicants under the act of 1878. December 9, 1884, the State surveyor general telegraphed to the Commissioner of the General Land Office abandoning all claim to the tracts specified, and withdrawing his said application to select them. December 10, 1884, the Commissioner accepted said relinquishment, canceled said selections, and at the same time notified the local officers and the State surveyor general of such fact. December 18, 1884, the State surveyor general wrote the Commissioner again abandoning all claim to said lands, on the grounds that the State did not wish to contest the prior timber application and revoking the authority theretofore given to said Stratton to appear in the case. December 29, 1884, the surveyor general again telegraphed the Commissioner, stating in full his reasons for abandoning and relinquishing the selections aforesaid, and appointing Britton and Gray to represent the State in the matter. December 31, 1884, the Commissioner again canceled the selections afore-

said, and directed the local officers to note the same on their records. January 3, 1885, W. J. Johnston, Esq., of this City, on behalf of Stratton moved a reconsideration of said action of December 31, preceding. On the same day the Commissioner telegraphed the local officers to suspend action under the orders of cancellation until further advised.

Arguments *pro* and *con* were filed, and on the 28th of February, 1885, the Commissioner rendered the decision from which Stratton's appeal now under consideration was taken. This decision disposed of the selections in township twelve aforesaid and canceled them, not on the ground of the several relinquishments before mentioned, but upon the ground that the prior applications for the same land under the act of 1878, operated as an appropriation of the same as against a selection by the State.

Stratton's appeal from this decision was transmitted by the local officers April 9, 1885. Under date of July 23, 1886, the Commissioner notified the local officers that he would entertain said appeal, and accordingly, under date of October 20, 1886, the papers in the case were forwarded to this Department.

The motion under consideration prays the dismissal of said appeal on the ground that Stratton had no authority to take and file it. Stratton's authority for appearing in the case at all is found in a letter from the State surveyor general to the local officers, at Humboldt, under date of August 16, 1883, which letter is as follows :

Gentlemen: I hereby authorize Mr. James T. Stratton, of San Francisco, to act as attorney for the State of California, in the matter of the contest in your office, concerning sections 2, and the N. $\frac{1}{2}$ of Sec. 11, T. 11 N., R. 1 E., H. M., and sections 23, 26 and 35, T. 12 N., R. 1 E., H. M., applications for which as indemnity school lands had been made to your office and rejected, and he is authorized to appeal from your decision declining to file said applications.

H. I. WILEY,
State Surveyor General.

The authority conferred upon Stratton by this instrument is claimed by him to be coupled with an interest, and therefore irrevocable. The only doubt in my mind as to the granting of this motion arose from the question as to whether the authority conferred by this instrument was coupled with an interest and therefore beyond the power of the surveyor-general to revoke after the matter came before the General Land Office. He, Stratton claims to represent certain applicants to purchase this land from the State, and as such representative entitled to control the management of this case before the Department.

Now, it is well settled that in adjusting Congressional grants of land to a State, the executive officers of the United States have no jurisdiction to review transactions between the State and its purchasers, nor between the State and its locating agents, and determine whether such purchasers or location agents complied with the provisions of its laws relating to the sale of the lands. *Fraser v. O'Connor* (115 U. S., 102),

David Foster (5 C. L. O., 6). The Department can deal only with the State in the adjustment of a grant made to her (id.). In dealing with the State, the Department necessarily deals with her legally authorized agent.

Under section 3398, (Political Code of California).

The surveyor general is the general agent for the State for the location in the United States land offices of the unsold portion of 500,000 acres of land granted to the State for school purposes, and the sixteenth and thirty-sixth sections granted for the use of public schools, and lands in lieu thereof.

Under section 3411—

The surveyor general must represent the State in all contests between it and the United States in relation to public lands.

Now under the general rule of law announced in *Frasher v. O'Connor* (*supra*), and the sections of the political code of California just quoted, the surveyor general of that State is the party with whom the United States must deal in adjusting the school land grant. He is the duly and legally authorized agent for the State for such purposes, and as such agent has a delegated authority which, under the rule announced in *Shaukland v. Corporation of Washington* (5 Pet., 390), can not be delegated. True he may appoint an attorney to represent the interests of the State, but such attorney can certainly have no greater authority in the matter of school lands than he who appointed him. The power to appoint necessarily carries with it the power to revoke such appointment, unless the authority conferred by such appointment is coupled with an interest or is given for a valuable consideration, or is a part of a security (1 Bouv., 100), the principal always being responsible, of course, for the consequences of breaking his contract with the agent. *In re Paschal* (10 Wall., 483).

In the case last cited the court ruled specifically that a party has a general right to change his attorney, the attorney retaining the advantage of any lien he may have on papers or moneys in his hands as security for his fees and disbursements.

It has been shown that Mr. Stratton's original authority to appear in this case is to be found in the surveyor general's letter to the register and receiver at Humboldt, under date of August 16, 1883. The nature and extent of that authority will be considered further on. For the present it suffices to say that that authority was revoked by the same power that granted it under date of December 18, 1884, aforesaid, if such power of revocation existed in the surveyor general. It has also been shown that the general power to *revoke* an appointment, is incidental to the power to *make* such appointment, subject, of course, to the exceptions specified.

Now, has James T. Stratton such an interest in the subject matter of this controversy as to take his case out of the general rule, just stated, with reference to the revocation of an appointment? In other words

is his interest, or that which he represents, such as to entitle him to be heard here on appeal, notwithstanding the fact that the legally authorized agent of the State acquiesces in the decision of the Commissioner of the General Land Office?

The interest he claims to have in this controversy is simply that of a representative of the derivative claimants under the State. He claims that the State through its legally authorized agent—the surveyor-general—is not acting in good faith towards such derivative claimants whose attorney he is; and that therefore, he, and not the surveyor general who originally authorized him to appear in the case, should be entitled to manage the case, and act in the capacity of State agent in the adjustment of the school land grant.

His interest (if interest he have) as already stated, is simply that of a representative of certain claimants for the land under the State, who can have no direct dealings, as such with the United States. If their interests be jeopardized by the action of the State, their remedy must be against the State in her own tribunals—not before the executive department of the United States government. This is clearly apparent from the rule laid down by the supreme court in the Frasher-O'Connor case (*supra*), and is surely founded in reason as was said in the Foster case (*supra*): The United States government recognizes only the State in the adjustment proceedings; and it will not go back of the records to ascertain whether, as between the State and her agent, he complied with the provisions of her statute, relating to the sale of granted lands.

But furthermore, it does not appear by the record here, that Stratton has even such an interest as that described. The fact that there ever were any *bona fide* claimants under the State to any of the lands in controversy is denied by the State surveyor general, who expressly states that the original applications filed for this land in 1883, by the claimants Stratton professes to represent, were found to be “bogus,” and have all been canceled and rejected. The effect of this statement of the surveyor general, based upon the records of his office, is strengthened by the fact that several of the before-mentioned timber land applications have passed to cash entry, and homestead entries have been made of nearly all the other lands in controversy; and if additional confirmation were needed it will be found in the further fact that Stratton has since filed applications of other and subsequent claimants for these selfsame lands.

It is therefore found that Mr. Stratton, and likewise Mr. Johnston, who derives his authority from Stratton, do not have such an interest in the subject matter of this controversy as to entitle them to be heard here on appeal from the commissioner's decision canceling the selections aforesaid. Their said appeals are therefore dismissed.

It is not deemed necessary in this consideration to discuss the question of the right of the State surveyor general to abandon and relinquish an indemnity school selection once made, because the decision of

the Commissioner sought to be appealed from in no wise rests upon such supposed right, and did not pass upon that question.

The right of the State to her indemnity selections in T. 18 N., R. 1 E., H. M., held for cancellation by the Commissioner's decision of March 23, 1887, will be made the subject of another decision.

HOMESTEAD COMMUTATION—PRE-EMPTION.

BALL v. GRAHAM.

The commutation of a homestead entry is not an exercise of the pre-emptive right. The case of *Sturgeon v. Ruiz* cited and followed in construing the second clause of section 2260 R. S.

Acting Secretary Muldrow to Acting Commissioner Stockslager, December 15, 1887.

Graham having received his cash entry certificate March 20, 1884, Ball contested on the ground that Graham had exhausted his pre-emption right, and had failed to reside upon and cultivate the land. On final hearing the local office decided adversely to claimant and held his entry for cancellation November 25, 1885. Whereupon claimant appealed January 22, 1886, denying the jurisdiction of the local office, and alleging error in the trial and decision. This appeal was considered and decided by you February 5, 1886, and the action of the local office affirmed.

Your decision appears to be based upon a wrong construction of the law, viz: that a previous homestead entry by claimant which he commuted to a cash entry March 16, 1883, before making his pre-emption claim, was such an exercise of his pre-emption right as to bring him within the provisions of section 2261 of the Revised Statutes, and you quote as authority for your decision the case of *James Brittin* (12 C. L. O., 228.) This case was however reversed by the Department. See 4 L. D., 441.

Neither does it appear that the case of claimant comes within the second inhibition of Section 2260, Revised Statutes. See *Sturgeon v. Ruiz* (1 L. D., 490); *Austrian v. Hogan* (6 C. L. O., 11, 172).

It becomes unnecessary to discuss the question of jurisdiction of the local office or the action of the register and receiver in admitting testimony and granting continuance, or the sufficiency of notice. The evidence offered on the contest is too weak and negative in its character to raise the presumption of fraud against the claimant, or authorize the cancellation of his certificate.

Your decision is therefore reversed.

*PRACTICE—NOTICE BY PUBLICATION—JURISDICTION.***BALDWIN v. RANDALL.**

In the service of notice by publication, posting in the local office, and mailing notice by registered letter to the claimant, are essentials without which jurisdiction is not acquired.

Acting Secretary Muldrow to Acting Commissioner Stockslager, December 15, 1887.

May 29, 1880, Allen W. Randall made timber culture entry for the SW. $\frac{1}{4}$ of Sec. 25, T. 111, R. 63, Huron, Dakota. December 4, 1883, Joseph Baldwin initiated contest, charging failure to cultivate to crop or otherwise the land broken during the first and second years after entry; that there was no appearance of timber, seeds, or cuttings set out during the third year on the breaking of first year; that in no year since date of entry has land been put in condition to receive timber seeds or cuttings, etc., that weeds and grass had grown up on said breaking.

After notice, by insertion for five successive weeks in the Dakota Huronite, the contestant averring that claimant's post-office address was unknown and could not be obtained, a hearing was held by the local officers March 25, 1884, when the claimant not appearing and upon affidavits submitted by contestant, the said contest was sustained. Notice of the foregoing decision was mailed to claimant, who denies its receipt.

May 29, 1884, Randall filed application for an extension of time, it appearing by affidavit of his attorney that an abstract, obtained from the local office, disclosed no contest.

February 13, 1885, Randall's entry was duly canceled by your office.

March 16, 1885, one Clarence R. Terry made timber culture entry for the land. August 4, 1885, one George W. Mallet presented the relinquishment of Terry, and same date made application for timber culture entry on said land, and which the local office refused to consider, because of Randall's right of appeal.

Your office letter of December 22, 1885, canceled said entry of Terry, and found that the said application of Mallet should have been allowed subject to the rights of Randall.

May 14, 1885, Randall applied for a rehearing, averring no notice of contest and compliance with the law.

January 27, 1885, your office refused said application, and August 13, 1885, Randall made a second application which was also refused, March 10, 1886.

The case is now before me on appeal by Randall from your said decisions of June 27, 1885, and March 10, 1886, refusing his respective applications for rehearing.

Your decision of June 27, 1885, refused the said application, for the reasons that the affidavits in support thereof were unsatisfactory; that

no copy of the "motion for rehearing was served on the opposing parties," and that "it does not appear by affidavit that the motion is made in good faith."

Your decision of March 10, 1886, finds that notice of the decision of June 27, 1885, being given July 6, 1885, and that "motion for review" not having been filed in the local office until August 13, 1885, the affidavits in support of said second application, setting forth in detail Randall's compliance with the law, together with affidavits of several neighbors, to the effect that at the time of contest they knew his (Randall's) whereabouts, but had never been so asked, not containing any newly discovered evidence "were not filed in time (Rule 77), and will not be considered."

It does not appear that the notice of contest was ever posted in the local office, nor that any attempt had been made to mail to the claimant (Randall) a registered letter containing such notice. This being true, jurisdiction was never acquired by the local office. The question of jurisdiction can be raised at any time, and the claimant being without notice of contest, his motion for rehearing should be granted.

Your decision is reversed.

RAILROAD GRANT—ACT OF JUNE 15, 1880.

NORTHERN PAC. R. R. CO. v. ELDER ET AL.

A grant of land was made to the Northern Pacific for the construction of its road from Portland to Tacoma.

No right of purchase under the second section of the act of June 15, 1880, exists where the entry was canceled and adverse right intervened, prior to the passage of said act.

Secretary Lamar to Commissioner Sparks, September 30, 1887.

This is a claim to the W. $\frac{1}{2}$ of NE. $\frac{1}{4}$ and S. $\frac{1}{2}$ of NW. $\frac{1}{4}$, Sec. 7, T. 20 N., R. 3 E., Olympia district, Washington Territory, asserted by the Northern Pacific Railroad Company, under its grant, and by James T. Elder, Edgar Percival and Walter S. Bowen, under their respective applications to enter and purchase said land under the general land laws.

The decision of this case depends upon two issues therein presented, to wit: (1) Whether the Northern Pacific Railroad Company has a grant of lands for that portion of its road from Portland to Tacoma; and (2) Was the tract in controversy land to which the United States had full title, unappropriated and free from pre-emption, homestead or other claim or right at the date of definite location of the road opposite said tract.

The question as to whether the Northern Pacific Railroad Company has a grant from Portland to Tacoma has been decided affirmatively by the Department in the case of the Northern Pacific Railroad Company

v. Donald McKae (6 L. D., 400), upon the issue distinctly presented, and that question is therefore disposed of.

The tract in controversy adjoins the city of Tacoma, and is within the limits of the withdrawal of August 13, 1870, upon map of general route for the Northern Pacific Railroad Company, and of definite location of May 14, 1874, for the main line, and also within the limits of withdrawal on general route for the amended branch line, which took effect July 19, 1879.

On February 2, 1869, James T. Elder made homestead entry of the land in controversy, which was canceled by the Commissioner of the General Land Office July 27, 1872.

March 17, 1884, Edgar Percival applied to enter the W. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of said section as soldier's additional homestead.

March 19, 1884, Walter S. Bowen applied to enter under the homestead law the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of said section.

March 21, 1884, James T. Elder made application to purchase the tract in controversy under the act of June 15, 1880.

All of said applications were rejected by the register and receiver, on the ground that upon the cancellation of Elder's entry, July 27, 1872, the tract became public land, and so remained until the amended withdrawal on general route for the branch line, which took effect July 19, 1879, and that Elder's entry did not except said land from said withdrawal.

You reversed the action of the local officers, upon the ground that affidavits have been presented which satisfied you that the relinquishment upon which Elder's entry was canceled in 1872 was never made or intended to have been made by Elder, and that said cancellation being erroneous, his claim to the land excepted it from the operation of the grant to the company.

Holding that no adverse right had attached to the land to interfere with his right of purchase, you directed that Elder be allowed to purchase under said act, and rejected the applications of Bowen and Percival. From this action the company, Bowen and Percival, severally, appealed.

The issue as to the status of the land at the date of filing of map of definite location by the road depends upon whether the cancellation of Elder's homestead entry, July 29, 1872, was a valid cancellation and made by authority of Elder. If it was, the right of the road attached upon filing of map of definite location, May 14, 1874, and defeats the claim of all other parties to this controversy.

In his affidavit filed March 24, 1884, Elder says, that when he applied to the local officers, February 13, 1884, to purchase said land under the act of June 15, 1880, he learned for the first time that his entry had been canceled by voluntary relinquishment, and believing that he had his duplicate receipt at home, he made search for it, but failed to find it, it being lost or mislaid. That when a complaint was

filed against his homestead entry in 1872, he understood from Register J. P. Clark that the case would be dismissed without cost to him. That he did not voluntarily relinquish his homestead entry, or authorize any one to relinquish it for him, and never knew anything of the kind until informed by Register John F. Gowey, February 13, 1884.

It is not pretended by Elder that he was in any manner imposed upon, or was induced from any cause to sign such relinquishment, but he denies that the relinquishment purporting to have been signed by him, upon which his entry was canceled, was ever signed by him, or by any one authorized to act for him.

In the record is a relinquishment of the tract in controversy purporting to be signed by James T. Elder, and sworn to and subscribed before J. P. Clark, register, the 5th day of June, 1872. This relinquishment was transmitted to the General Land Office by the register, who must have been personally acquainted with Elder, or, at least, knew that he was the person who made homestead entry of the tract in controversy. We have therefore the evidence of the register, over his official signature, that Elder signed said relinquishment. Besides, a comparison of this signature with the signature to his homestead application, made February 2, 1869, and also the signature of Elder to his affidavits, filed in 1884, bear such a striking similarity to each other that it is almost impossible to doubt that they were written by the same person.

Corroborative of this, Elder in his affidavit made in 1884 states that he believed his duplicate receipt was at his house, but upon search being made he found that it had been lost or mislaid. He therefore had no remembrance of having surrendered the duplicate receipt, and yet that paper is among the records of the General Land Office, having been transmitted by the register at the same time with the relinquishment.

As there is no pretence that this paper was stolen or obtained surreptitiously from Elder, it leads to an almost irresistible conclusion that Elder surrendered the paper to the local officers when the relinquishment was signed.

Again, in his affidavits of March 20, 1884, and September 1, 1884, he states that when the contest was filed against his homestead entry for abandonment in the spring or summer of 1872, the contestant failed to appear, and the register dismissed the contest and told affiant his homestead was all right, and he could go home. This he states was the only time he was ever at the Olympia office until March, 1884 (afterwards corrected to February 13, 1884), when he applied to purchase under the act of June 15, 1880.

But his conduct thereafter was totally inconsistent with this theory. On the contrary it was corroborative of the allegation that at that time he relinquished all claim to the tract, because from that time at least he seems to have abandoned the land, and made no further claim

to it until twelve years afterwards, when he applied to purchase under the act of June 15, 1880.

From these facts, I do not think it can admit of a doubt that Elder's entry was canceled July 21, 1872, upon a relinquishment filed by Elder, and although he now denies that he ever signed such relinquishment, the circumstances above referred to present stronger proof of such fact than his remembrance of the transaction twelve years afterwards. I am therefore led to the conclusion that the tract in controversy was open public land, free from pre-emption, homestead or other claim or right at the date of definite location of the road, May 14, 1874, and that the application of the several claimants to enter said tract under the general land laws was properly rejected.

Elder's entry having been canceled prior to the date of definite location of the road, and the right of the road having attached prior to the passage of the act of June 15, 1880, there was no right in Elder to purchase under said act.

Your decision is reversed.

SCHOOL LANDS—MEASURE OF GRANT.

STATE OF COLORADO.

From the terms of the statute it is obvious that Congress intended to grant to the State for school purposes two sections, the sixteenth and thirty-sixth, of every township, where such sections at the time of survey had not been sold or otherwise disposed of, and to provide an equivalent for said sections in the event that they were not subject to the grant at the time of the survey.

Inasmuch as at the date of survey the sixteenth and thirty-sixth sections lying within the Ute reservation had been disposed of, the State is entitled to indemnity therefor.

Where the fee is in the United States at survey but the land is so encumbered that title cannot fully vest in the State, an equivalent therefor may be taken by the State, or it may elect to await the union of title and possession in the government and then take the land specifically granted.

Sections sixteen and thirty-six appearing as mineral at date of survey do not pass under the grant, but the State is entitled to indemnity therefor.

Secretary Lamar to Acting Commissioner Stockslager, December 6, 1887.

I am in receipt of your report of January 29, 1887, upon the communication of H. P. Bennett, Esq., agent for the State of Colorado, respecting the condition of the grant to said State for school purposes, made by the 7th section of the act of March 3, 1875 (18 Stat., 474), with reference to the lands embraced in what was formerly the Ute Indian reservation, and certain military reservations therein mentioned.

You conclude that as section sixteen and thirty-six within the Ute reservation were at the date of the act admitting Colorado as a State reserved for the exclusive use of the Indians, Congress did not intend to grant in place for school purposes sections sixteen and thirty-six

within said reservation, and that the State is not entitled to said sections, nor to indemnity therefor.

As to the claim of the State to indemnity for sections sixteen and thirty-six within military reservations, you express no opinion.

By the 14th section of the act of February 28, 1861 (12 Stat., 172), entitled "An Act to provide a temporary government for the Territory of Colorado," it was enacted:—

That when the land in the said Territory shall be surveyed, under the direction of (the) government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said Territory shall be and the same are hereby reserved for the purpose of being applied to schools in the States hereafter to be erected out of the same.

While this reservation did not amount to a grant, or to a dedication in the strict legal sense as to withdraw from Congress the power of disposition over it, it had all the force and effect of a grant so long as it continued. It was the purpose of Congress to reserve said sections for the use of schools, and when the grant was subsequently made, upon the admission of the State, provision was made for indemnifying the State for such of said sections as may have been sold, or disposed of prior to survey.

At the date of this act, the lands in controversy were subject only to the common Indian right of occupancy, no reservation having been made with the Ute Indians up to that date.

By a treaty between the United States and the several bands of Ute Indians, proclaimed November 6, 1868, a certain tract of land therein defined being part of the Territory occupied by the Utes at the date of the act establishing the Territory of Colorado, and within the limits of said Territory, was set apart for the absolute and undisturbed use and occupation of said Indians, in consideration of which they relinquished all claim to any other portion of the United States or Territories.

Provision was made for the selection of lands in severalty, to be held in exclusive possession of the person selecting it; for the recording of certificates of such selection; and that Congress shall provide for protecting the right of said Indians in their improvements, and may fix the character of the title held by each.

It then provided that no treaty for the cession of any part of said reservation held in common should be of any validity as against said Indians, unless executed and signed by at least three-fourths of all the adult male Indians occupying or interested in the same; and no cession by the tribe shall be understood or construed in any manner so as to deprive any individual member of the tribe without his consent of his right to any tract of land selected by him as provided for.

Such was the condition of that part of the Territory of Colorado when it was admitted into the Union as a State by the act of March 3, 1875.

This act fixed the political boundaries of said State, which included the reservation aforesaid, and by the 7th section provided: "That sections sixteen and thirty-six in *every township*, and where such sections have been sold or otherwise disposed of by any act of Congress, other lands equivalent thereto, in legal subdivisions of not more than one quarter section and as contiguous as may be, *are hereby granted* to said State for the support of common schools." Section 15 provides: "That all mineral lands shall be excepted from the operation and grants of this act."

Subsequent to the admission of the State an agreement was submitted by the Ute Indians for a sale of their reservation. By act of June 15, 1880 (21 Stat., 199) ratifying said agreement, it was provided that nothing therein contained should be so construed as to compel any Ute to remove from any land that he or she claims in severalty, and that all lands which by that agreement are released and conveyed to the United States shall be held and deemed public lands, subject to cash entry only, in accordance with existing laws, the proceeds of said sales to be held as a trust fund for the benefit of said Indians, without exception or reservation.

Under the provisions of this act, and the act of July 28, 1882, (22 Stat., 178) all of said lands were released and ceded to the United States for the purposes of the trust aforesaid, with the exception of a small strip in the southwestern part of said State now occupied by the Southern Utes, whose right of occupancy is guaranteed by Congress.

The lands embraced in that part of the reservation ceded were not surveyed until 1882, and since then said lands have been and are being disposed of under the provisions of the act of June 15, 1880, and July 28, 1882, except a tract of four miles square, embracing hot springs, in what is known as Uncompahgre Park, reserved and set apart for the benefit and use of the public.

It is evident from the very terms of the grant that Congress intended to grant to Colorado (and the same is true of other States) two sections for every township in the State to be taken of the sixteenth and thirty-sixth sections, where such sections at the time of survey have not been sold or otherwise disposed of, and where at the time of survey such sections have been sold or disposed of, then other lands equivalent thereto and as contiguous as may be are granted to said State in lieu of the sixteenth and thirty-sixth sections.

This question has been so well settled by the decisions of the supreme court that I think there can no longer be any controversy as to the proper construction of the extent and purpose of this grant. You conclude that in view of the treaties and act of 1875, Congress could not have intended to grant in place for school purposes the sections within the Ute reservation, because said lands were reserved for the exclusive use of said Indians, whose occupancy could not be disturbed without their consent, which was not obtained until after the grant to the State,

and that as said sections were not granted in place, the State is not entitled to indemnity therefor.

Congress undoubtedly has the power to grant any and all lands to which the government holds the fee, and although at the date of the grant the land might be so encumbered, that full legal title with right of possession could not pass thereby until the removal of the encumbrance, yet upon the removal of the encumbrance full and complete legal title, with right of possession, would vest as of the date of the grant.

In *Beecher v. Wetherby* (95 U. S., 517), the court said: "In the construction of grants supposed to embrace lands in the occupation of the Indians, questions have arisen whether Congress intended to transfer the fee or otherwise, but the power of the United States to make such transfer has in no instance been denied."

In the present case the intention of the grantor was to grant two certain sections in every township for the use of schools, and where such sections at the time of survey have been sold or otherwise disposed of, other lands equivalent thereto are granted. Therefore the number of townships or fractional townships within the limits of the State forming a part of the public domain, of which the fee was in the United States at the date of the grant, is the measure of the extent of the grant, and the conditions of sections sixteen and thirty-six at the time of the survey determines whether those particular sections are subject to the operation of the grant. So that, the legal impediment that may prevent the grant to the State from ripening into a perfect title to the sections specifically granted, must exist after the township has been surveyed and the sections identified, and if any incumbrance then exists to prevent a full and complete title from passing to the State, the State will be entitled to select other lands in lieu thereof.

This question came before the supreme court in the case of *Cooper v. Roberts* (18 How., 173) in which the court said:

We agree that until the survey of the township and the designation of the specific section, the right of State rests in compact—binding, it is true, the public faith, and dependent for execution upon the political authorities. Courts of justice have no authority to mark out and define the land which shall be subject to the grant. But when the political authorities have performed this duty, the compact has an object, upon which it can attach, and if there is no legal impediment the title of the State becomes a legal title.

To the same effect is the decision of the court in the case of *Heydenfeldt v. Daney Gold, etc., Co.* (93 U. S., 634.)

This was a contest between a claimant holding patent from the United States to mining claim, embracing part of a sixteenth section, by virtue of settlement made after the admission of the State and prior to the survey of the township, and a claimant holding title from the State as school land.

Speaking of the grant to Nevada of school lands, which is in the identical language of the grant to Colorado, the court say :

Her people were not interested in getting the identical sections sixteen and thirty-six in every township. Indeed, it could not be known until after survey where they would fall, and a grant of quantity put her in as good condition as the other States which had received the benefit of this bounty. A grant operating at once, and attaching prior to the surveys by the United States would deprive Congress of the power of disposing of any part of the lands in Nevada, until they were segregated from those granted.

Therefore the court held that the words of present grant are restrained by the words of qualification, intended to protect the State against loss that might happen through the subsequent action of Congress in disposing of the public domain, for, say the court :

There was no occasion for making provisions for substituted lands, if the grant took effect absolutely on the admission of the State into the Union, and the title to the lands then vested in the State. . . . Besides no other construction is consistent with the statute as a whole, and answers the evident intention of its makers to grant to the State *in presenti* a quantity of land equal in amount to the sixteenth and thirty-sixth section in each township. Until the status of the lands was fixed by a survey and they were capable of identification, Congress reserved absolute power over them, and if in exercising it the whole or any part of a sixteenth or thirty-sixth section had been disposed of, the State was to be compensated by other lands equal in quantity and as near as may be in quality.

The decision in the case of *Beecher v. Wetherby* (95 U. S., 517), rendered one year later, affirmed this ruling, although no reference was made in the decision to the case of *Heydenfeldt*.

It is true that in the case of *Beecher v. Wetherby* the court said :

In the present case there can hardly be a doubt that Congress intended to vest in the State the fee to section sixteen in every township, subject, it is true, as in all other cases of grants of public lands, to the existing occupancy of the Indians, so long as that occupancy should continue.

But the court evidently meant that the fee vested when section sixteen had been surveyed and identified. This is not only in harmony with every other ruling of the court, but also with the facts of that case, in substance as follows :

By a treaty ratified January 23, 1849, the Menominee Indians ceded to the United States all their lands in Wisconsin, though permitted to remain on them for a period of two years, and until the President should give notice that they are wanted. Subsequently, the Indians being unwilling to leave the State, the President permitted their temporary occupancy of lands on the Wolf and Oconto rivers, and by a treaty of May, 1854, the United States ceded to them certain lands for a permanent home, which took effect upon its ratification in August of that year.

This cession embraced the section in controversy, which had been surveyed in May or June, prior to the ratification of the treaty. Hence, at the date of survey, the fee being in the United States, subject only to a right of temporary occupancy, it immediately vested in the State, subject to that right, so long as it should continue. Afterwards a portion of the lands embracing the section in controversy was ceded to the Stockbridge Munsee Indians. Under the act of February 1, 1871, authorizing the sale of the townships occupied by the Stockbridge Munsee Indians, the tract in controversy was sold to plaintiff. The court held that Congress did not intend by the act of February 6, 1871, to authorize the sale of the sixteenth section of said township, obviously for the reason that, at the date of survey, the Indian title had been extinguished, and nothing at that date prevented the vesting of the fee in the State.

But even if the Indian title had not been extinguished at the date of the grant, it would not have prevented the grant from attaching at the date of survey, subject to the Indian right of occupancy, unless the section had prior to that time been sold or disposed of. If the specific section had been disposed of at the date of survey, the State would be entitled to indemnity under the express terms of the grant.

It is true, the court held in *Beecher v. Wetherby*, that at the date of the grant to Wisconsin, no obligation existed on the part of the government of such a character as would be a bar to the grant, although at that date there was in existence a treaty with the Menominees, defining their territory and providing that said reservation should be their future home. This reservation would have been as effective in excepting these lands from the operation of the grant under consideration in the case of the Leavenworth, Lawrence and Galveston Railroad, relied upon in your decision, as the reservation under consideration in that case.

The case of the Leavenworth, Lawrence & Galveston R. R. Co. (92 U. S., 733) involved the construction of a railroad grant that by its terms expressly excepted from the operation of the grant all lands "reserved by the United States for any purpose whatever," and therefore has no application to the case here presented.

The error in your decision lies in construing the school grant as a grant *in presenti*, taking effect at the date of the grant and only upon such lands as were then in a condition to pass specifically by the grant; whereas the grant does not take effect until after survey, and if at that date the specific sections are in a condition to pass by the grant, the absolute fee to said sections immediately vests in the State, and if at that date said sections have been sold or disposed of, the State takes indemnity therefor.

It is true the territory embraced within the Ute reservation had been practically disposed of prior to the admission of the State into the Union, but the fee remained in the United States, and it was part of

the public domain and within the political boundaries of Colorado. Unlike the ordinary reservation held by common Indian title, it was permanent, in this, that it was a reservation with well-defined boundaries, set apart for the exclusive and absolute use of said Indians, to which an unlimited right of occupancy had been guaranteed by treaty, and which could not be disposed of or impaired, except by the full and free consent of said Indians.

The act of June 15, 1880, providing for the sale of this reservation for the sole benefit of said Indians, was in pursuance of the previous treaty obligations that said lands should not be disposed of without their consent. Therefore, treating this reservation as disposed of either under the treaty of 1868, or by the sale made thereof under the act of June 15, 1880, it had been disposed of at the date of survey, and it being (to use the language of the court in the case of Heydenfeldt), "the evident intention of its makers to grant to the State *in presenti* a quantity of land equal in amount to the sixteenth and thirty-sixth sections in each township," I think there can be no doubt that the State is entitled to indemnity for the sixteenth and thirty-sixth sections of the townships within what was formerly the Ute reservation.

As to the question of indemnity for lands lying within military reservations, I have not sufficient information before me to pass upon.

I think, however, the true theory of the school grant is this: That where the fee is in the United States at the date of survey and the land is so encumbered that full and complete title and right of possession can not then vest in the State, the State may, if it so desires, elect to take equivalent lands in fulfillment of the compact, or it may wait until the title and right of possession unite in the government, and then satisfy its grant by taking the lands specifically granted.

I think this view is fully sustained by the decisions of the courts and the opinions of the Attorneys General. See *Cooper v. Roberts* (18 How., 173); 3 Op., 56; 8 Op., 255; 9 Op., 346; 16 Op., 430; *Ham v. Missouri* (18 How., 126).

The exception contained in the 15th section of the act admitting the State of Colorado into the Union, to wit, "that all mineral lands shall be excepted from the operation and grants of this act," was not intended to diminish the grant, but merely to reserve and withhold from sale or other disposal all mineral lands, except in the manner provided for under the general laws governing the dispositions of said lands.

The controlling and main purpose and object of the grant was to appropriate for the use of schools two sections for every township of the public lands within said State, and if, in the construction of the grant, a literal interpretation of any part of it would operate unjustly, or lead to results contrary to the evident meaning and primary object of the act taken as a whole, it should be rejected. *Heydenfeldt v. Daney Gold, etc., Co.*, (93 U. S., 638).

Therefore, if upon the survey of a township the lands embraced in sections sixteen and thirty-six are shown to be of the character denominated as mineral lands, within the meaning of the acts providing for the disposal of said lands, the state would not be entitled to those specific lands, because the disposal of said lands has been otherwise provided for, but the State would be entitled to equivalent lands as indemnity therefor.

That there might be no question as to the proper interpretation of this grant as to mineral lands—the act of April 2, 1884 (23 Stat., 10) construed the act of March 3, 1875, admitting Colorado into the Union as giving to said State the right to select for school purposes other lands in lieu of the sixteenth and thirty-sixth sections, as may have been or shall be found to be mineral lands.

You will adjust the school grant to the State of Colorado in accordance with the principles above stated.

RESTORATION OF INDEMNITY LANDS—RULE OF MAY 23, 1887.

Secretary Lamar to Acting Commissioner Stockslager, December 15, 1887.

On May 23, 1887, a rule was entered on certain land grant railroad and wagon road companies to show cause why the several orders of withdrawal from settlement of the lands within the indemnity limits of their several roads should not be revoked, and the lands therein embraced restored to settlement, returnable as to a certain number of said roads on June 27, and as to the remainder on June 28, 1887, at ten o'clock A. M.

A copy of the rule was duly served on each of said companies.

Of the companies thus cited, the following failed to answer:

State of Alabama.—South and North Alabama; Selma, Rome and Dalton; Alabama and Florida.

State of Florida.—Florida, Atlantic and Gulf Central; Pensacola and Georgia; Florida and Alabama.

State of Iowa.—Burlington and Missouri River; Chicago, Rock Island and Pacific; Cedar Rapids and Missouri River; Dubuque and Pacific; Chicago, Milwaukee and St. Paul.

State of Kansas.—St. Joseph and Denver City.

State of Michigan.—Grand Rapids and Indiana; Jackson, Lausing and Saginaw; Chicago and Northwestern.

State of Wisconsin.—Chicago and Northwestern.

While it may be presumed that there is but a small amount, if any, of vacant unappropriated lands within the indemnity limits of the roads above mentioned, still the withdrawals remain in force, and in view of the fact that there may be unsettled lands within the indemnity limits

of said roads, I hereby direct that all lands heretofore withdrawn and held for indemnity purposes under the grants to said roads be restored to the public domain and offered to settlement and entry under the general laws after giving the usual notice.

FINAL COMMUTATION PROOF—CULTIVATION.

ADELPHI ALLEN.

The plea of "late settlement," or "unfavorable season," is not sufficient to warrant the acceptance of final commutation proof, where the improvements shown do not embrace cultivation or any definite act looking thereto.

Acting Secretary Muldrow to Acting Commissioner Stockslager, December 15, 1887.

The only question raised by this appeal is the right of claimant to receive a commutation final certificate, she having failed to show "cultivation," except as evidenced by the erection of a frame house eighteen by twenty feet with fence and outbuildings and construction of a private road leading from the highway to the house in which claimant has a one third interest the total valuation of which is \$225.00.

In answer to question 6, as to how much land she had cultivated, etc., she replies: "Not any; the season when I settled was too late." One of her witnesses testified in answer to question 7, as to how much the settler cultivated etc., say "Not any cultivated, but preparations made for cultivation next season; the present season it was too late when she settled." The other witness testified substantially the same. In supplemental affidavit filed in your office with appeal, claimant seeks to excuse her failure to cultivate the land by alleging that the season was excessively dry and that it would have been useless to have planted crops which could not have matured.

The local office rejected her proof upon the ground that no cultivation was shown which action you affirmed April 22, 1886, alleging that "cultivation of the land entered is an essential prerequisite to the commutation of a homestead entry."

Section 2301 of the Revised Statutes provides as follows: "Nothing in this chapter shall be so construed as to prevent any person who has availed himself of the benefits of section 2289 from paying the minimum price for the quantity of land so entered at any time before the expiration of the five years and obtaining a patent therefor from the government as in other cases directed by law, upon making proof of settlement and cultivation as provided by law, granting pre-emption rights."

Section 2263, of the pre-emption law, provided that "prior to the entries being made under and by virtue of the provisions of section 2259,

proof of *settlement* and *improvement* thereby required, shall be made to the satisfaction of the register and receiver of the land district in which such lands lie, agreeable to such rules as may be prescribed by the Secretary of the Interior."

Recurring to the rules prescribed by the Secretary, he has defined the proof required in cash entries to establish "residence on and cultivation of the tract." See Circular of General Land Office, page 7. While the law in relation to pre-emption cash entries uses the words "*settlement and improvement*" and the law as provided in section 2301 in reference to homestead cash entries require proof of "settlement and cultivation" yet the words "cultivation" and "improvement" appear to have been used synonymously by the Department in determining the character of the improvement required in cash entries. Improvement is defined as "the act of improving or the state of being improved, advancing in growth or promotion in growth in desirable qualities, progress towards what is better, melioration, as the improvement of the mind, of the heart, of lands, roads etc., applying particularly to land, it means "valuable additions or amelioration, as buildings, clearings, drainings, fences, etc., on a farm;"—while cultivation is defined as the "art of cultivating, improving for agricultural purposes." (See Webster).

As to what constitutes cultivation, the Department decided in *Engen v. Sustad* (11 C. L. O., 215) that the erection of a house twelve ft. square, eight ft. high, the digging of two wells, one twenty-four and the other thirteen ft. deep and breaking three and one-half acres of land and the erection of a stable eleven by twelve ft. constituted cultivation. In the *ex parte* case of Calvin L. Wilson (10 C. L. O., 343) the Department held that the commutation proof required under section 2301 must show cultivation and improvement as required by the homestead law. But the question of what constituted cultivation was not raised nor decided in that case. The entryman expressly denied making any cultivation and gave no reason for his *laches*. In the case of John E. Tyrl, (3 L. D., 49) it was decided that a commutation homestead cash entry should not be canceled the evidence showing good faith, continuous residence, and that the entryman had cleared for the purpose of cultivation about one-half acre and gave as an excuse that he "settled too late."

In the case under consideration, in view of the excuse offered, the Department is of the opinion, in view of the meagre proof offered, that the excuse for no cultivation or any definite act looking towards cultivation other than the erection of a house, outbuildings, fences and private road is not such as to justify your office in issuing cash certificate, but the case being *ex parte* and good faith being unquestioned the claimant should be allowed an opportunity to furnish additional proof as to cultivation.

PRE-EMPTION—SECTION 2260 R. S.; REHEARING.

VAN GORDON *v.* EMS.

The fact that an intending pre-emptor divests himself of the title to land, upon which he is then residing, on the very day on which he alleges settlement on other land, is a circumstance sufficient to warrant a doubt as to his good faith.

A claim of residence is not consistent with the substantial maintenance of a home elsewhere.

A rehearing will not be ordered upon an application which sets up no facts that might not have been presented at the former hearing, and gives no reasons for not presenting such facts at that time.

Acting Secretary Muldrow to Acting Commissioner Stockslager, December 15, 1887.

I have considered the case of Charles Van Gordon *v.* Joseph W. Ems, on appeal by Ems from your office decision of February 9, 1886, rejecting his final proof and holding for cancellation his filing for the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 10, T. 3 N., R. 23 W., Bloomington, Nebraska, land district.

Ems filed declaratory statement for said land April 9, 1884, alleging settlement April 8. Van Gordon made homestead entry for same land July 7, 1884.

Ems gave notice that he would offer final proof January 5, 1885, upon which day Van Gordon appeared and filed protest, alleging—

1st, That said Ems did on the 25th day of May, 1874, file D. S. No. 2349 upon the W. $\frac{1}{2}$ of NW. $\frac{1}{4}$, 11, and E. $\frac{1}{2}$ NE. $\frac{1}{4}$ 10-3-23, and afterward perfected a homestead entry upon said tract.

2d, That said Ems moved from land of his own in this State to reside upon the land embraced in this D. S., upon which he has now advertised to make proof, and that he has not acted in good faith in the matter of residence.

A hearing was had on that and the following days, upon which the local officers decided in favor of the claimant and against the protestant. Van Gordon appealed, and your office decision was rendered February 9, 1886, rejecting Ems's proof and holding his filing for cancellation. From this decision Ems appealed.

The facts shown upon the hearing upon the allegation that Ems had exercised his pre-emption right prior to filing for the land in question are meagre. It appears that on May 24, 1874, there was filed a declaratory statement for the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 11 and the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 10, T. 3 N., R. 23 W., signed "Joseph W. Ems," and that Ems afterward made homestead entry for the same land. Ems says that he did not sign that paper, and that it was not filed with his knowledge or consent. He admits that he knew of said filing some two years before he filed for the land in question here, at which time he saw the papers, having gotten them from his father. One witness testifies that Ems told him, about two years before the hearing, that he (Ems) would

like to have this land in dispute, but that he had already used his pre-emption right, but "said he thought they would not know it." Ems says he does not remember ever having any conversation with this witness about the land.

Under these circumstances, we may fairly conclude that if the filing was made without Ems's knowledge or consent, it was made in his name and for his benefit, that he had a knowledge of these facts at the time of the filing in this case, and attempted to conceal the truth in regard thereto.

It is shown that on the 8th of April, 1884, the date of the alleged settlement on the land in question, Ems was living on his homestead, not having removed therefrom to his pre-emption, according to his own statement, until May 6. Ems says he sold his homestead land to his brother, the deed therefor being made April 7th or 8th. The two witnesses to his final proof both testify to having seen the deed on the day before the hearing, but neither can state positively what date the deed was acknowledged. The deed itself is not produced nor is it shown it was ever recorded. The opinion of all these witnesses seems to be that the deed was acknowledged April 8.

The fact that one divests himself of the title to land upon which he is then residing upon the very day on which he alleges settlement upon other land, which he claims under the pre-emption law, is a circumstance which, while it may be in accord with entire good faith, yet tends to create a doubt of his good faith in the matter. The doubt in this case is strengthened and increased by other facts. It is clearly shown that the grantee in this deed never took possession of the land conveyed thereby, but that the grantor retained possession thereof, cultivated it, kept thereon his horses, cattle, hogs, chickens, and farming utensils, and made improvements thereon during the summer following the alleged sale.

The facts shown as to claimant's residence justify the conclusion that he did not go upon this land with the intention of making it his permanent home. According to his own statement, he established a residence on his pre-emption claim on May 6th, by removing his family, bedding, furniture, stove and cooking utensils there. He remained there until May 19, when he moved back to his homestead, because the heavy rains caused the ridge pole of his house on the pre-emption claim to break and let the roof partly down, by reason of which the water soaked through. That they returned on June 17, and remained there continuously thereafter, except about two weeks in the latter part of August during harvest, when they for convenience took their meals at the homestead house. Several witnesses state that during the period from June 17, to August 4, they frequently passed these places, and saw no sign of any one living in Ems's house on the pre-emption claim, but did see him and his family on the homestead land. It is also shown by several neighbors that the homestead presented all the appearances of a family

living there, such as smoke coming from the chimney, children in the yard, clothes hanging on the line, etc., while the house on the pre-emption claim showed none of these signs of being the home of a family.

It is clear that Ems kept all his feed, stock, and machinery on his former homestead and made no preparations for taking care of them on his pre-emption claim, such as digging a well, building stables, sheds, fences, etc., such as is shown he had on his homestead. It is shown that he left in his homestead house certain articles of furniture and clothing, which the claimant attempts to explain by saying they were old articles and such as they had no use for on the pre-emption claim.

After a careful consideration of all the facts, I conclude that Ems has not acted in good faith, that he never established a residence on said land with the intention of making it his home, and that his pretended transfer of his homestead to his brother was for the purpose of qualifying himself to make the affidavit necessary in such cases, and therefore his final proof should be rejected and his filing canceled.

For the reasons herein set forth, your said decision is hereby affirmed.

On December 11, 1886, the claimant, Ems, filed in this office a petition, asking that a new hearing be ordered in this case. There is no fact set up in support of said petition that could affect the decision herein that might not have been presented at the former hearing, and no reason given for not presenting these facts at that time, and said petition is therefore denied.

FINAL PROOF—CONFLICTING CLAIMS.

BOWMAN v. GRIFFIN.

On the rejection of the final proof offered by two pre-emptors for the same tract, without according priority to either, both may be allowed, in the absence of bad faith, to submit new proof after due notice.

Acting Secretary Muldrow to Acting Commissioner Stockslager, December 15, 1887.

Jerry Griffin filed declaratory statement May 2, alleging settlement May 1, 1884, upon the NE. $\frac{1}{4}$ of Sec. 11, T. 3 N., R. 30 W., McCook, Nebraska.

Nancy Bowman filed declaratory statement for the same land May 14, alleging settlement May 13, 1884.

Both parties submitted proof December 19, following. Upon the testimony submitted at the hearing thus initiated, the local officers rejected the proof of each, but found that Griffin had the prior right to the land. The appeal of Bowman from your decision of February 10, 1886, sustaining the action below, brings the case here.

From the testimony it appears that Griffin went on the land May 2, 1884, and made his mark with a pocket knife; that May 14, 1864, he

began to build a dug-out which he finished May 16 following, when he began his residence and from which time to the date of hearing he remained upon the land an average of about three nights a week; that his wife and children lived at the house of one Heaffy in McCook, his wife refusing to live on the land in consequence of the delicate health of her children. It also appeared that he raised some corn and pumpkins.

Bowman went on the land May 13, 1884, and dug a trench two or three feet wide, about the same in depth, and eight by ten feet, as the commencement of a foundation for a house; that she began her residence on the land in a tent May 30, 1884; that she finished her house (a dug-out) about the middle of June thereafter, wherein she resided continuously until date of hearing. In her final proof Bowman averred that she had broken one acre but had raised no crop.

The want of inhabitancy on the part of Griffin and the extreme meagerness of improvement and cultivation on the part of Bowman seems equally to call for the rejection of the proof of both, hence your decision in that respect is affirmed, but without according priority to either claimant. The final proof of both pre-emptors is therefore rejected; but as bad faith is not apparent, the right to submit new final proof, after due advertisement, may be exercised by either or both of said parties within sixty days from receipt of notice of this decision. Neither the proof of Griffin submitted August 28, 1885, nor his supplemental affidavit dated April 24, 1886, to the effect that Bowman abandoned the land have been considered.

Your decision is modified in accordance with the foregoing.

HOMESTEAD ENTRY—PRELIMINARY AFFIDAVIT.

SCHROTBERGER *v.* ARNOLD.

During the existence of an entry the land covered thereby is not subject to appropriation by another.

An entry though made when the land was not subject to appropriation, on the removal of the bar, may be allowed to stand intact.

Execution of the preliminary homestead affidavit before a clerk of the court, without prior residence, renders the entry voidable, not void, and the defect may be cured in the absence of an adverse claim.

Acting Secretary Muldrow to Acting Commissioner Stockslager, December 16, 1887.

I have considered the case of Robert Schrotberger *v.* Joseph Arnold, as presented by the appeal of the latter from the decision of your office, dated February 13, 1886, holding his entry for cancellation.

The record shows that on April 28, 1885, said Schrotberger, made homestead entry of the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 34, T. 43 N., R. 2 W., at the

Bayfield land office in the State of Wisconsin, and on the same day, said Arnold was allowed to make homestead entry on the same tract, alleging that he was residing upon and had improved the same, having commenced settlement thereon April 10, 1885.

A hearing was ordered by your office letter, dated February 13, 1886, to determine the rights of the parties, at which both appeared and offered testimony. From the evidence submitted, the local land officers rendered their joint report, that said Schrotberger had failed to comply with the requirements of the homestead law as to residence and that his said entry should be canceled. The local land officer also decided that said Arnold made his said entry upon an affidavit executed before the clerk of the court of the county wherein said land was situate; that the allegation that said Arnold was residing on said land several days prior to the date of said affidavit was untrue; that at the date of said entries there had been no actual appropriation of said tract by either party; that from the appearance of said Arnold while testifying in his own behalf, it is evident that "he was an honest German, almost entirely ignorant of the meaning of English words and that he did not intentionally allege in his homestead affidavit what he knew was not true"; that since said Arnold made his said entry he has complied with the requirements of the homestead law in good faith; that although Arnold should not have been permitted to make said entry yet, in view of the fact that he has shown good faith, his entry should be allowed to remain intact. From this decision Schrotberger did not appeal.

On February 13, 1886, your office considered said case, and held that "the fact that defendant is an honest German; that his false swearing was unintentional and due to ignorance of the English language, is well calculated to enlist sympathy, but in view of the fact that he had not settled upon, cultivated or improved the land prior to the date of the first legal application," his said entry must be canceled, notwithstanding contestant's failure to appeal, under Rule of Practice, No. 48.

It must be remembered that the failure of the contestant to appeal is a waiver of any claim he might have had, and the case must be considered solely between the government and the claimant.

The local land officers find, and your office concedes, that the claimant has acted in good faith, and that the allegation of prior residence and settlement was unintentional on his part. The local land officers should not have allowed the second entry while the first entry remained intact. *Henry Cliff*, and cases cited therein, (3 L. D., 216); *Legan v. Thomas*, *et al.* (4 L. D. 441).

The first entry having been canceled, the rights of the claimant under his entry must be considered as though the land was subject to entry under the homestead laws. Arnold's homestead entry having been made in good faith was not absolutely void on account of said affidavit, only voidable, and the defect may now be cured by the claimant in the absence of an adverse claim. (*Thompson v. Lange* 5 L. D., 248).

The prior entry of Schrotberger being canceled, and there being no adverse claim, there does not appear to be any good reason why Arnold's entry should not be allowed to stand subject to final proof showing full compliance with the law. He will be required within thirty days from notice hereof, to file a proper supplemental affidavit before the local land officers in lieu of the affidavit upon which his said entry was allowed.

The decision of your office is modified accordingly.

RAILROAD GRANT—ACT OF APRIL 21, 1876.

ALABAMA & CHATTANOOGA R. R. CO. *v.* CLABOURN.

Under the third section of the act of April 21, 1876, an entry, in other respects satisfactory to the Department, should not be rejected because of a prior withdrawal, if at the time of such entry the grant under which the withdrawal was ordered had expired by lapse of time.

The words "expiration of such grant," as used in said section refer to the expiration of the time within which the road, by the terms of the statute, should have been constructed, and not to the forfeiture of the grant by legislative or judicial proceedings.

The status of land entered in accordance with this section is not changed by the subsequent passage of an act reviving the grant and extending the time for the completion of the road.

The section under consideration is not unconstitutional as it only protects entries made during a time when Congress might have properly declared a forfeiture of the grant for breach of the condition subsequent.

Acting Secretary Muldrow to Acting Commissioner Stockslager, December 16, 1887.

I have before me the appeal of the Alabama & Chattanooga Railroad Company from your decision of February 1, 1886, rejecting its selection of, and holding valid Clabourn's entry for, the NW. $\frac{1}{4}$ of Sec. 31., T. 10 S., R. 4 E., Huntsville, Alabama.

The decision appealed from is objected to on the ground that, at the date of Clabourn's entry, November 12, 1868, the land in question was not subject to entry, it being a portion of the lands heretofore withdrawn, by an order which had not been revoked, as the indemnity belt under the grant made June 3, 1856 (11 Stat., 17) to the State of Alabama, to aid in the construction of the appellant's road.

You held, on the contrary, that Clabourn's entry must be sustained, notwithstanding the withdrawal mentioned, because of its (said entry's) having been made "by the permission of the Land Department" after "the expiration of the grant," and its being thus brought within the provisions of the third section of the act of April 21, 1876 (19 Stat., 35) to the effect that entries answering this description are to be "deemed valid."

Appellant objects to this upon these grounds:

1. That Clabourn's entry was not in fact included among those which the act of 1876 ordered to be held valid;

2. That if, on the other hand, the true construction of the act in question is one which would hold Clabourn's entry valid, then the act itself must be held unconstitutional, and allowed no effect whatever.

The former contention the appellant supports by the following assertions: First, that the entry was not in fact made "by the permission of the Land Department," within the meaning of that requirement of the statute; Second, that the entry was not in fact made "after the expiration of the grant" in the sense in which the act uses these words.

I do not think that the appellant can maintain the assertion that the entry was not, within the meaning of the law, made by permission of the Land Department. His argument is that at the time of the making of this entry the Department made it the practice to reject entries which, like this one, covered lands included within an unrevoked withdrawal, whether the term allowed by the granting act had "expired" or not. But that, if true, is not to the point. The condition imposed by the act of 1876 is that the entry shall "have been made by the permission of the Land Department or in pursuance of the rules and regulations thereof." This can not have been meant to raise the question whether, before the statute, the entry would have been held defective on the ground that the land had been withdrawn: That ground of objection it was the one object of the statute to waive; consequently the statute can not have been intended to operate only (or at all) in cases to which the objection would not have applied in any event! Clearly, the provision means, that any entry which in other respects is satisfactory to the Department shall not be rejected because of a withdrawal if, at the time when such entry was made, the grant in support of which the withdrawal was ordered, had expired by lapse of time. The only defect charged against Clabourn's entry is the one which the statute was enacted to waive in all cases in which "the grant had expired."

We are thus brought to the appellant's second assertion—that the entry was not in fact made "after the expiration of the grant," in the sense in which the act uses these words.

That is to say, what the act means by "expiration of the grant" is, not simply the expiration of the time during which the road was to have been built, but, that, *plus* legislative or judicial proceedings to declare and enforce the forfeiture incurred by non-fulfillment of the condition.

As if in proof of this, the appellant cites authorities going to show, first, that until after proceedings had to enforce the forfeiture and resume possession, the non-completion of the road within the time allowed does not of itself and at once absolutely incapacitate the delinquent company from dealing with the lands granted; and, furthermore, that such an act of revival as that of April 10, 1869 (16 Stat., 45) passed to revive the grant and give the company further time in which to com-

plete, is not to be taken as a legislative declaration of and insistence upon the forfeiture, but rather (on the contrary) as a waiver of the forfeiture and as in effect an amendment of the original act in respect of the length of time to be allowed.

Both points are freely admitted. But the decisions cited neither did nor could properly undertake to hold that, because the omission to enforce the forfeiture allows the company to "hold over," so to speak, under its grant, therefore it can not be either natural or permissible for Congress under any circumstances to speak of the expiration of the time given without fulfillment of the condition, as "the expiration of the grant." And while it is thus true, on the one hand, that no such inflexible lexicographical intent or effect can be attributed to the authorities, it is also true, on the other hand, that, in the absence of such alleged judicial determination the other way, there is, under the circumstances, no obvious escape from the conclusion that the act of 1876, in the expression "entries made within the limits of any land grant at a time subsequent to expiration of such grant," meant, by the "expiration of the grant," the expiration of the time allowed for completion, without the fulfillment of that condition, and not as appellant claims, the "termination of the grant by a legislative or judicial proceeding."

In the first place, the very word, "expiration," suggests rather a lapsing out, or cessation through inherent limitation, than destruction by a subsequent affirmative act of revocation or annulment. Secondly, the supposed judicial modifications of this natural construction, are not really such, since they in fact involve, not a denial of the fact of expiration, but, rather, (on the contrary) the basing, on the omission to declare a forfeiture, of a legal presumption that the government waives, or refrains from insisting on, such forfeiture and its incidents—an attitude which obviously implies, not that the grant had not expired, but that it had, since otherwise there could not have been anything to "waive," or any option on the part of the government to "declare" a forfeiture by any "proceedings" whatsoever. Lastly, in a case in which the grant had been expressly declared forfeited "by legislative or judicial proceedings," there would have been no occasion whatever for this act of 1876, inasmuch as after such proceedings there would have been no question at all as to the re-opening of the land to settlers. But, in cases in which no "proceedings" had been had, entries made after the (actual) expiration of the grant but before the express revocation of a withdrawal, would not improbably have been held to be, in view of such withdrawal, unauthorized and incapable of initiating any right against the government. It is for these cases, in which alone it could have been of use, that the statute must be held to have provided; the provision as to them being, in effect, that, so far as concerns lands covered by entries otherwise regular, the prior actual "expiration of the grant" should be deemed to have revoked the withdrawal, even though such "expiration" might not have been declared

and insisted on as a ground of forfeiture. As to such lands, that is to say, the act of 1876 is itself the "legislative proceeding" needed as the expression of the will of Congress that the forfeiture be insisted on. *Wenzel v. St. Paul, M. & M. Ry. Co.* (1 L. D., 333).

In this particular case, however, another element is introduced by the circumstance that, between the date of "expiration of the grant," and the passage of the act just now considered, Congress enacted Chapter 24 of the laws of 1869 (16 Stat., 45) and thereby "revived and renewed" the grant here in question and allowed the company "three years from the passage of this act" in which to complete its road. The question accordingly arises, whether the enactment of this law on April 10, 1869 (*supra*) fully seven years before the act of 1876, did not withdraw the tract entered by Clabourn from the category of lands which, as having been entered, within the meaning of the act of 1876, "at a time subsequent to the expiration of the grant," must, under the provision above construed, be held to have been "validly" entered, notwithstanding the unrevoked order of withdrawal? In other words, the grant in this case having been "revived and renewed" seven years before the enactment above discussed, can the latter be construed as having meant to include that grant among those which it describes as grants which had "expired"?

The appellant insists that the renewal act must be held to have in effect wiped out the expiration, and placed things on precisely the same footing on which they would have been had the original act itself allowed the company until April 10, 1872, instead of June 3, 1866, for completing its road. And it may be admitted, even without the authority of such cases as that which the appellant cites ("*St. Louis, Iron Mountain & Southern Railway Co. v. McGee*"), that the act of April 10, 1869, did in fact what it in terms professed to do, *i. e.*, it "revived and renewed" the grant, and in effect "merely operated as an amendment to the act of June 3, 1856, so as to require the road to be constructed on or before April 10, 1872." But there is nothing in either the text, or the obvious intent and policy of this "amending" act of 1869, which requires us to erect, for this railroad's benefit, the extraordinary legal fiction that it took effect June 3, 1866,—nearly three years before its enactment; and that, too, so thoroughly, as to annihilate the occurrences of the intervening period. It would seem entirely clear that Clabourn's entry, having been, when it was made (in November, 1868), an entry "made subsequent to the expiration of the grant," must, as a historical fact, always fall within the class of entries so described, and that, accordingly, the provision of the act of 1876, as to such entries must be read as *prima facie* at least including it, notwithstanding the renewing act of 1869. It can not be assumed that the latter was intended to operate otherwise than with reference to the state of things existing at the date of its enactment, and subject to all the incidents and consequences of that state of things. The original grant itself was to take effect

only upon such of the lands within the stated limits as should, at the date of definite location, remain unsold, and otherwise undisposed of, and there is nothing to show that the legislation of April, 1869, contemplated any other re-instatement of the grant than one consistent with all acts done in the interval between the expiration in June, 1866, and such re-instatement in April, 1869. For what it might be worth, then, the fact that Clabourn made homestead entry of the tract involved on November 12, 1868, "after the expiration of the grant," became irrevocably a fact in the case on the day of its date, and must, with whatever implications it may have, be taken into the account.

What are those implications? It seems to me, these: That, subject only to the government's right to insist upon the unrevoked withdrawal as a bar to any but a voidable entry, Clabourn initiated, before the re-instatement of the grant, a homestead claim capable of ripening into a valid one, on the subsequent waiver or condonation by Congress of the irregularity involved in the entry's having been made during a technical withdrawal. The tract in question being covered, not by the specific grant, but by the permission to select "lieu" lands by way of indemnity; and, no selection of such tract having in fact been made until long after the act of 1876; it is entirely clear that no right had at the date of the said act actually vested in the company, but that on the contrary Congress was at that time entirely at liberty to dispose of this, as of every other, unselected portion of the indemnity belt. To land "within the secondary or indemnity territory," "the railroad company had not and could not have any claim until specially selected" (*Ryan v. Railroad Co.*, 99 U. S., 388). And Congress having expressly waived whatever right the government had to object to the entry on account of the withdrawal, it is not necessary to decide whether, with respect to the indemnity belt, the withdrawal was in fact a bar to the initiation of claims under the general land laws. *Alabama & Chattanooga R. R. Co. v. Uptain* (2 L. D., 500).

II. Construed as providing merely that entries made during a period when Congress might, if it had chosen, have declared the whole grant to have been forfeited, shall not be deemed invalid, section three of the act of 1876 is not, in my opinion, "unconstitutional," even admitting that Congress has no power under the constitution to pass "a law impairing the obligation of contracts" (as to which see *Legal Tender Cases*, 12 Wall., 457). The granting acts do not constitute a contract by Congress not to insist upon forfeiture for breach of the condition subsequent, on the contrary, they contemplate forfeiture in that contingency, and Congress has the option to restore the unearned lands to the public domain. The greater includes the less, and the power to forfeit all the grant implies the power to restore to the public domain such of the unearned lands as may have been covered by entries made "subsequent to the expiration of the grant."

Your decision is accordingly affirmed.

PRE-EMPTION ENTRY—HEARING ON SPECIAL AGENTS' REPORT.

UNITED STATES *v.* BARBOUR.

In proceeding against an entry the affirmative is with the government. If the evidence shows that the law has not been complied with, and that the entryman by his own act has rendered further proof on his part impossible, the entry will be canceled, notwithstanding the plea of "hardship."

Acting Secretary Muldrow to Acting Commissioner Stockslager, December 19, 1887.

I have considered the case of the United States *v.* Loren A. Barbour, as presented by the appeal of the latter from the decision of your office, dated May 25, 1886, holding for cancellation his pre-emption cash entry No. 1292, of the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, and N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 8, T. 122 N., R. 65 W., 5th P. M., made April 17, 1883, at the Aberdeen land office, in the Territory of Dakota.

The record shows that said Barbour filed his pre-emption declaratory statement for said tracts, on September 21, 1882 alleging settlement thereon July 6, same year. On February 23, 1883, the register gave due notice of the claimant's intention to make final proof in support of his claim, before said officers, on April 17, same year. At the time and place appointed the settler made his final proof and the same was accepted by the local land officers, and final certificate was issued thereon. The final proof shows that said claimant was duly qualified to make said settlement; that he made settlement on said land on July 6, 1882; that his first act of settlement was building a house; that his improvements consist of a frame house ten by twelve feet, a barn ten by twelve feet; that he first established actual residence on said land on July 6, 1882; that he was absent during the blockade about sixty days, but the rest of the time his residence was continuous; that he has used said land for farming purposes.

The witnesses to the final proof corroborate the statements of the claimant as to qualifications, settlement and residence, and state that the improvements are worth \$110 and that there are ten acres cultivated on said land.

On May 29, 1884, your office suspended said entry upon the report of a special agent of your office that the final proof upon which said entry was allowed was false, and directed that a hearing be had in accordance with the rules of practice. The hearing was had before the local land officers on May 25, 1885, at which the claimant appeared in person, and by attorney, the United States being represented by said special agent. Counsel for claimant filed a motion that "the United States be declared to have the affirmative of the issue in this cause and that he, the said defendant, be not required to submit any testimony until the United States shall have made a case."

This motion was overruled and thereupon the claimant submitted the testimony of three witnesses including his own, to sustain the validity of his said entry.

* * * * *

The only witness on the part of the United States was said special agent, and he testified that he made a personal examination of said land on November 1, 1883, and found about nine acres of breaking; that there was then no barn or shanty on said land; that from information obtained from the settlers in the vicinity he placed the value of the improvements, when final proof was made at thirty dollars; that he has tried to obtain the attendance of those settlers but they refused to testify because, as they said, they did not wish to have anything to do with cancellation cases.

From the evidence submitted the receiver was of the opinion that the claimant never established and maintained a residence as required by law; that there is no need of assuming a fraudulent intent on the part of the claimant, but that under the circumstances as shown by the record, said cash entry ought to be canceled. The register, however, filed an elaborate dissenting opinion, holding that the testimony failed to show bad faith; that since the claimant's final proof made after due notice had been accepted by the local land officers, and the money paid for the land, in the absence of any adverse claim, it would work a hardship to cancel said entry and forfeit the money paid. The register also calls attention to the fact that the final proof on its face was insufficient and it was error on the part of the local land officers to receive the same, but that their error should not be visited upon the claimant.

On appeal by the claimant from the action of the receiver your office on May 25, 1886, held said entry for cancellation.

It is quite apparent that the final proof was insufficient to warrant the allowance of said entry. It was error on the part of the local land officers in overruling said motion. *George T. Burns* (4 L. D., 62).

Since the testimony submitted by the claimant and his witnesses shows non-compliance with the requirements of the law and regulations of this Department, and the claimant having sold said land, thereby rendering it impossible for him to cure his laches, I am of the opinion that he must suffer from his own laches and that the plea of "hardship" cannot be allowed. As was said in *Goist v. Bottum* (5 L. D., 647):

But the law must be administered on principle, notwithstanding individual hardship may sometimes be caused thereby, as to deviate from a general rule, because of particular hardship is most mischievous and dangerous. For, as has been repeatedly said, 'hard cases make bad law.'

It follows, therefore, that the decision of your office is correct, and it is hereby affirmed.

JOINT ENTRY—ACT OF JULY 23, 1866.

WILDER v. BRADFORD.*

The extent of a joint entry permissible under section seven, act of July 23, 1866, is measured by the joint occupancy of the parties and includes only such legal subdivisions as are required to secure an adjustment of coterminous boundaries. In the consummation of such joint entry each party thereto is entitled to enter that portion of the land defined by his original purchase and separate occupation.

Secretary Lamar to Commissioner Sparks, July 22, 1886.

James B. Bradford has filed a motion for review of my decision of April 15, 1886, in the case of Benjamin F. Wilder, administrator, v. J. B. Bradford.

The decision sought to be reviewed was rendered in the above stated case upon an application of J. B. Bradford, alleging that a manifest and technical error in the decision of Secretary Delano of April 16, 1873, rendered in the case of B. F. Wilder, administrator, v. J. B. Bradford, appears upon the face of the record, and praying that it be corrected.

My decision of April 15th last treated the application then under consideration as practically a motion for review of my predecessor's decision of April 16, 1873. Upon this theory the conclusion therein reached was correct.

The motion now under consideration calls attention to the fact that the application upon which my decision was rendered was not a motion for a review or rehearing of the decision of Secretary Delano, but simply an application to correct an error appearing on the face of the record.

The error complained of is that by the decision of April 16, 1873, the Secretary allowed a joint entry of the entire SE. $\frac{1}{4}$ of Sec. 10, awarding to Wilder an entry of land to which he made no claim and which was not involved in the controversy thereby decided.

On further examination of parts of the record to which my attention has been called by this motion for review, I find that Wilder applied to purchase, under the 7th section of the act of Congress of July 23, 1866 (14 Stat., 218) a certain tract of land, embracing part of section 11, and the E. $\frac{1}{2}$ of the E. $\frac{1}{2}$ of Sec. 10; and that Bradford filed for the SE. $\frac{1}{4}$ of Sec. 10. It therefore appears that the east half of the SE. $\frac{1}{4}$ was alone involved in the controversy between Wilder and J. B. Bradford, and that the west half of the SE. $\frac{1}{4}$ was not involved in the controversy, because Wilder made no claim to that part of Bradford's filing. The decision of Secretary Delano above referred to recites the fact that the claim of the estate is to a portion of the E. $\frac{1}{2}$ of the E. $\frac{1}{2}$ of Sec. 10, embracing a certain tract lying to the east of the western fence of his enclosure, which was built prior to the act of 1866, and which ran diagonally across the eastern portion of the SE. $\frac{1}{4}$ of Sec. 10, while in con-

* Omitted from Vol. 5.

cluding his decision he awards a joint entry of the entire SE. $\frac{1}{4}$ of the section.

A diagram filed with the record of evidence submitted in the case, and identified thereby, shows that the fence referred to runs diagonally across the eastern portion of the SE. $\frac{1}{4}$ of Sec. 10, and that no part of the fence is on the W. $\frac{1}{2}$ of said quarter. This fence was referred to by Secretary Delano as the boundary line of Wilder's claim, and determined the extent of Wilder's right of purchase under the act of 1866.

A motion for review of this decision was made by Bradford, alleging among the grounds of error that the fence referred to by the Secretary as the boundary line of Wilder's original purchase did not exist.

Upon this motion the Secretary, again reciting the fact that the claim of Wilder was for certain tracts lying to the east of the western fence of his enclosure which was built prior to the act of 1866, and which ran diagonally across the eastern portion of the SE. $\frac{1}{4}$ of section 10, and that James B. Bradford settled in March or April, 1866, upon the SE. $\frac{1}{4}$ of section 10, says: "Upon this finding of fact I awarded the SW. $\frac{1}{4}$ of section 10 to the claimants jointly for an adjustment of their boundaries." Further on he says: "The land in this case was unsurveyed at the date of the settlement by Bradford, and at the passage of the act the separate possessions of each were divided by a fence marking one line of the grant purchase, and the improvements of each are within their respective separate possessions."

The decision of Secretary Delano distinctly decided two questions, which must of necessity govern in executing his decision: (1) That the right of Wilder to purchase under the act of 1866 was limited to such tracts of land as he had improved and continued in actual possession of, according to the lines of his original purchase; and (2) That the western line of his original purchase was defined by a fence that ran diagonally across the eastern portion of the SE. $\frac{1}{4}$ of section 10. This right can neither be diminished nor enlarged by any construction that may be applied to this decision.

The 7th section of the act of July 23, 1866, referring to *bona fide* purchasers of lands from Mexican grantees whose grants have subsequently been rejected, provides:

Such purchasers may purchase the same, after having said lands surveyed under existing laws, at the minimum price established by law, upon first making proof of the facts as required by this section, under regulations to be provided by the general land office, joint entries being admissible by coterminous proprietors, to such an extent as will enable them to adjust their respective boundaries.

The extent of joint entry allowed by this act was evidently such a legal subdivision or divisions as were covered by their joint occupancy, and no more; and the part of such subdivision allowed to purchasers under this act embraced simply the land occupied by them and embraced in their former purchase. A joint entry of the two eastern legal subdivisions of forty acres each would have been sufficient to enable

these parties to adjust their coterminous boundaries, because their joint occupancy was embraced within those legal subdivisions, and practically those subdivisions were alone involved in the controversy; but the award of a joint entry of the SE. $\frac{1}{4}$ could not confer upon Wilder the right to purchase a larger tract than was embraced within his original purchase, because such a construction is not authorized by the record, and would be in violation of the law under which he claims the right of purchase.

In this view of the case, the decision of the Secretary may be properly executed without the amendment or correction asked for, and without further instructions from the Department.

It appears, however, that the administrator of Wilder has tendered the sum of \$100 in payment for one-half of said quarter section, although the record shows that, under the act of July 23, 1866, by authority of which he claims, he was only entitled to purchase that portion lying to the east of his fence, which embraces about one-fourth of said quarter section. The decision of Secretary Delano awarded no such right to Wilder, but solely the right to purchase the land embraced in his original purchase, and defined his western boundary to be the fence running diagonally across the eastern part of the SE. $\frac{1}{4}$ of section 10.

You will therefore notify the parties that they will be allowed to make joint entry of the SE. $\frac{1}{4}$ of Sec. 10, solely for the purpose of enabling them to adjust their respective boundaries according to the separate occupation of each, as set forth in the decision of April 16, 1873. Under such joint entry the administrator of Wilder will be allowed to purchase that portion of the SE. $\frac{1}{4}$ of section 10 lying to the east of the boundary fence referred to by Secretary Delano, after the quantity of land embraced therein has been determined, and the balance of said SE. $\frac{1}{4}$ will be allowed to Bradford as his share of said joint entry.

I return the record in the case of Wilder, admr., v. Bradford, and transmit herewith the motion for review of James B. Bradford, for file with the record in your office.

NOTE.—Motion for reconsideration denied December 3, 1886.

PRIVATE CLAIM—ACT OF JUNE 2, 1858.

WIDOW OF EMANUEL PRUE.

The confirmation of a claim to the "legal representatives" of the original occupant, on the application of a derivative claimant, vests no right in said occupant, and parties claiming through said occupant are not entitled to scrip under the act of June 2, 1858.

Acting Secretary Muldrow to Acting Commissioner Stockslager, December 22, 1887.

This case comes here on appeal by D. J. Wedge from the decision of your office, dated October 15, 1887, denying his application for certificates of location under the act of June 2, 1858 (11 Stat., 294), in satis-

faction of the private land claim of the legal representatives of the widow of Emanuel Prue. Your office rejected said application, on the ground that Wedge is not the party entitled to receive certificates of location in satisfaction of this claim.

This claim is entered as No. 24 "B" in the report, dated April 6, 1815, by Garrard, Wailes and Fitz, Commissioners for the Western District of Louisiana, Am. State Papers, Green's Ed., Vol. 3, pp. 84 and 91. Reference to this report shows that the claim was originally presented to the Board of Commissioners by one Daniel Callaghan, who claimed a tract of 11,943 acres of land on the Bayou *Cuckatree* (supposed to be *Crocodile*), alleged to have been purchased by him from the widow of Emanuel Prue, who, he alleged had purchased the tract from the Indians. The evidence of two witnesses was taken by the commissioners with reference to the alleged purchase by Mrs. Prue from the Indians, her alleged sale to Callaghan, and also as to her claim to the land by virtue of settlement, improvement and cultivation. Upon these questions, it was found that no written evidence of sale from the Indians to Mrs. Prue or from her to Callaghan had been produced, but that Mrs. Prue had resided upon this tract of land and cultivated it for about five years (1793 to latter part of 1797), and therefore the commissioners concluded their report as follows :

The commissioners are of opinion that this claim derives no validity from any title the Indians may have had to the land, but from being permitted by the Spanish government to occupy it as above stated, and not having, to the knowledge of the commissioners, abandoned the right thus acquired. They are of opinion that legal representatives of the widow of Emanuel Prue ought to be confirmed in their claim to six hundred and forty acres of land to be laid out in such form as will embrace the ancient improvements of said widow.

The claim was confirmed by the first section of the act of April 29, 1816 (3 Stat., 328).

The succession of Mrs. Emanuel Prue was opened in the parish court for Lafayette Parish, Louisiana, in 1872, and on the 29th of August of that year, pursuant to a decree of said court, this claim was sold to D. J. Wedge, in whose favor the sheriff of said parish issued the usual act of sale as provided by the Louisiana laws.

Wedge then made application to the surveyor-general of Louisiana for certificates of location under the act of 1838, and on the 16th of August, 1877, that officer issued such certificates—four in number of one hundred and sixty acres each, marked No. 360, A, B, C and D. These are the certificates the Commissioner of the General Land Office refused to authenticate and deliver to the attorney for Wedge.

It was found as a fact by the surveyor-general that this claim has never been located or satisfied in any manner, and that finding, from the record before me, is found correct within the rule laid down in *Stephen Sweazy* (5 L. D., 570). It is also found by the Department that as regards the succession proceedings heretofore mentioned this

case comes practically within the rule announced in the cases of Letricus Alrio (id., 158), and John Shafer (id., 283). That is to say: At the succession sale in 1872, D. J. Wedge purchased the interest, right and title to this claim which was confirmed to Mrs. Prue, and none other. In other words, Wedge merely stands as the representative of Mrs. Prue and can claim nothing more than she could were she alive. Alrio case (*supra*).

Now was this claim confirmed to Mrs. Prue? For if it was *not* confirmed to her, then clearly it could not have been sold in 1872, as a part of her estate, unless it became her property subsequent to confirmation.

There is nothing in this record or in the State papers referred to going to show the exact date when Mrs. Prue died. Whether she was alive at the date of the report of the said commissioners or at the date of the confirmation aforesaid does not appear. It is to be noted also that this claim was not presented to the board by her or by any one in her interest. The presentation was made by Callaghan in his own interest who claimed to have purchased the interest of Mrs. Prue. It was then shown by the evidence of the two witnesses heretofore mentioned that Mrs. Prue had lived on a tract of land along the Bayou Crocodile for nearly five years, moving away from that land in the latter part of the year 1797. The Commissioners evidently went upon the theory that Mrs. Prue, having moved away from the land had parted with whatever title she may have had to it, whether to Callaghan who presented the claim or to some other party does not appear. At any rate they seem to have recognized no title in Mrs. Prue herself. The confirmation by the act of 1816, was based on said report, and is merely a general confirmation.

The report of the Commissioner's recommended that the legal representatives of the widow of Emmanuel Prue be confirmed in their claim, and the confirmatory act following the recommendation of this report confirmed the claim to the legal representatives of Mrs. Prue.

What class of legal representatives was intended to be benefited by this confirmation it is not easy to determine, whether her heirs at law, or her legal representatives by contract. In either case no estate in this claim vested in Mrs. Prue, for if by legal representatives were meant her heirs at law, then Mrs. Prue must have been dead when the Commissioner's made their report for "*Nemo est haeres viventis*": and if on the other hand by legal representatives was meant her legal representatives by contract, then it must be conceded that Mrs. Prue had already parted with her title to this claim when said report was made. (See Williams On Executors, Vol. 2, 1232).

If no estate in this claim vested in Mrs. Prue by the confirmation, then none was sold in 1872 at the succession sale aforesaid. The applicant for scrip herein merely purchased the right, title and interest of Mrs. Prue in this claim; and inasmuch as it has not been shown that

she had any interest whatever in the claim at the date of confirmation, or afterwards, it must necessarily follow that he can have no interest in it either.

The decision of your office denying his application for certificates of location is affirmed.

SCHOOL LAND—INDEMNITY SELECTION; HOMESTEAD.

NIVEN v. STATE OF CALIFORNIA.

School land settled on at survey, and subsequently abandoned, vests in the State as of the date of survey.

An invalid school selection of record bars the allowance of an application to enter; but as such application is in the nature of an attack upon the selection, the entry may be allowed upon the cancellation of the selection.

Acting Secretary Muldrow to Acting Commissioner Stockslager, December 22, 1887.

This is an appeal from your office decision, dated August 29, 1884, the material facts in the case being as follows:

November 21, 1877, the State of California filed in the local office at Stockton, in said State, a list of indemnity school selections under the act of 26th of February, 1859 (11 Stat., 385)—now Sec. 2275 U. S. R. S. In said list the W. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of Sec. 24, T. 2 N., R. 11 E., M. D. M., appeared as a selection made in lieu of the S. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of Sec. 16, T. 1 S., R. 16 E., M. D. M., upon which latter tract there had been filed a pre-emption declaratory statement, the claimant alleging settlement prior to the survey of the township in the field. The plat of said last mentioned township was filed in the local office June 4, 1875.

The settler, however, afterwards abandoned his claim, and under the decision in the case of *Water and Mining Company v. Bugbey* (96 U. S., 165), the land in section sixteen, embraced in his said claim, vested in the State as of the date of survey. The selection in question then necessarily became illegal, but had not been canceled on the records, when, on the 25th of June, 1884, Peter Niven applied to enter said selected tract under the provisions of the soldier's homestead act of 8th of June, 1872 (17 Stat., 333)—now Sec. 2304 U. S. R. S., *et seq.*

Niven's said application was rejected by the local officers, for the reason that said tract had been selected by the State as indemnity school lands as aforesaid.

The decision of the local office was reversed by your office in the decision appealed from.

So long as the selection in question remains of record, the application of Niven should not be allowed. But it is to be noted that Niven's application is also in the nature of an attack upon said selection; or, in other words, a contest against it. And since it is ascertained that said

selection should be canceled, no reason is apparent why Niven's said application should not be allowed.

You will therefore cancel said selection, and allow the application of Niven to enter.

Your decision is affirmed.

PRACTICE—CONTINUANCE—EVIDENCE—TRANSFeree.

WINDSOR v. SAGE.

The transferee of an entryman has the right to appear and defend in case the entry is attacked.

An order of continuance is within the discretion of the local office subject to review on appeal.

Evidence taken pending an order of continuance, and before a notary public not designated in accordance with the rules of practice, cannot be considered.

No action should be taken in a case by the local office pending an appeal from its decision rejecting the testimony offered by one of the parties.

Acting Secretary Muldrow to Acting Commissioner Stockslager, December 24, 1887.

I have considered the case of John W. Windsor v. Edwin E. Sage, as presented by the appeal of the latter, from the decision of your office dated October 8, 1885, transmitted to this Department by your office letter dated February 14, 1887, holding for cancellation his pre-emption cash entry of the S. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of Sec. 4, and the N. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of Sec. 9, T. 110 N., R. 60 W., made November 10, 1880, at the Mitchell land office in the Territory of Dakota.

The record shows that said Sage filed his pre-emption declaratory statement at the Mitchell land office on June 18, 1880, for said land, alleging settlement thereon March 25, 1880; that after due notice he offered final proof and payment for said land, which was accepted by the local land officers and final certificate issued thereon, November 10, 1880.

A special agent of your office having reported on July 14, 1884, that said entry was fraudulent, your office, on September 3, following, suspended the said entry and directed the local land officers to order a hearing to determine its character.

On October 14, 1884, the local land officers transmitted the application of said Windsor to contest said entry upon the ground that the final proof was false and fraudulent, and your office allowed said application on February 6, 1885.

A hearing was duly ordered, and April 1, 1885, was set for the trial of the case. The hearing was continued until May 15, 1885, and, as appears from the report of the local land officers dated August 7, 1885, was "again continued by stipulation of the parties until June 22, 1885", at which time, attorneys for both parties appeared, and also one Reed, an attorney, claiming to represent a subsequent bona fide purchaser

for value, and filed a motion that the case be continued for thirty days. The counsel for contestant offered to admit that the witnesses, if present, would swear to the statements set forth in the affidavit filed in support of the motion for a continuance. The local officers, however, granted the motion and said hearing was continued thirty days.

The contestant, by his attorney, excepted to the allowance of said motion and, refusing to acquiesce to said entry, proceeded to take the testimony of his witnesses before one J. L. Spaulding. The attorneys for said entryman and transferee did not cross examine the witnesses for contestant, but notified him that the method of procedure proposed was irregular and that they would object to consideration of said testimony by the local land officers; that said testimony was rejected by the register on June 25, 1885, from which action the contestant appealed.

On July 22, 1885, the day to which said trial had been adjourned, the attorneys for the claimant and transferee appeared with their witnesses, and their testimony was taken and held by the local land office to await the action of your office, on the appeal of the contestant.

On August 7, 1885, the local land office transmitted the papers and recommended that the testimony of both parties, including the rejected testimony of the contestant, be accepted and that the decision of the local land office be based thereon.

Your office on October 8, 1885, reviewed the proceedings and held that "the entryman's vendee cannot be recognized as a party to the record," that while the transferee should have the right to present testimony in support of said entry, it was error to grant a continuance upon the motion of the transferee, when the claimant himself could not have obtained it upon the showing made; that the action of the local land officers rejecting contestant's testimony was also erroneous; that the case must be determined upon the testimony submitted by both parties on July 22, 1885; and that upon the evidence submitted, said entry must be held for cancellation.

The decision appealed from states that the defendant "on July 22, 1885, submitted his testimony and cross examined witnesses who had previously testified for the contestant." This statement is hardly sustained by the record. It appears that the testimony of ten witnesses, including the contestant, was taken before said Spaulding, and only two of them were called by the claimant to testify in his behalf at the subsequent hearing on July 22, 1885.

It is clear under the decisions of this Department, the transferee has the right to appear and defend. Indeed, when the report of the special agent shows that there is a transferee such person is entitled to have notice and has a legal right to appear and defend the validity of said entry. *C. P. Cogswell* (3 L. D., 23); *R. M. Sherman et. al.* (4 L. D., 544); *United States v. Copeland et. al.* (5 L. D., 170.)

The testimony offered by the contestant was properly rejected by the local land officers for the reason that it was not taken in accordance

with the rules of practice. The case had been adjourned by the local land officers for thirty days. This action was an exercise of the discretion of the local tribunal, and while an abuse of that discretion may be corrected by the appellate tribunal, but so long as the order of adjournment remained in force, the contestant had no authority to take his testimony before an officer not designated as required by the rules of practice, especially in face of the protest of the claimant and transferee. It follows, therefore, that it was error to consider the *ex parte* testimony submitted by the contestant.

No decision had been rendered in said case by the local land officers, and the case should have been remanded by your office with directions to the local land officers, after due notice to all the parties, to take the testimony *de novo*. After the local land officers had allowed an appeal from their action rejecting the testimony of the contestant, it was also error for them to proceed and take the testimony of the claimant until action had been taken by your office on said appeal. It is, therefore, considered that this case be remanded to the local land office, and that the register and receiver be directed to notify said parties that at a time and place duly fixed, they will be allowed to submit testimony in their behalf, and upon the receipt of the report of the local land officers, together with their opinion upon the testimony, your office will re-adjudicate the case.

The decision appealed from is modified accordingly.

ADDITIONAL HOMESTEAD ENTRY—APPROPRIATION.

DUTTON D. NICHOLS.

The cancellation of the original homestead entry does not work the forfeiture of an additional entry based thereon, so as to relieve the land from the appropriation of such additional entry.

Acting Secretary Muldrow to Acting Commissioner Stockslager, December 27, 1887.

I have considered the appeal of Dutton D. Nichols from your office decision, dated November 10, 1885, rejecting his application to make homestead entry of the NE. $\frac{1}{4}$ of Sec. 8, T. 111, R. 39, Redwood Falls, Minnesota.

Said rejection only goes to the S. $\frac{1}{2}$ of said NE. $\frac{1}{4}$, and that for the reason that at the date of the application said N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ was covered by an additional or adjoining farm entry made by one Byron O'Hara, under the provisions of the act of March 3, 1879 (20 Stat., 472), granting additional rights to homestead settlers on public lands within railroad limits.

It appears that O'Hara made original homestead entry July 12, 1878, for the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of said section 8; that on June 7, 1879, he

made his additional entry under the act of March 3, 1879, for the S. $\frac{1}{2}$ of said quarter section, and that his original entry was canceled October 7, 1885, for failure to make proof within the seven years prescribed by law.

The additional entry has not been canceled and is still of record.

Appellant contends that the original entry having been canceled, the additional entry fell with it, and that all of the NE. $\frac{1}{4}$ of section 8, including the S. $\frac{1}{2}$ thereof covered by O'Hara's additional entry, is subject to entry, and that his application should be allowed. The contention that by the cancellation of the original entry the land covered by the additional entry became subject to entry, though said additional entry has not been canceled, can not be sustained.

In disposing of the proposition it is not necessary here to adjudicate the question as to the validity of O'Hara's additional entry. It is sufficient to know that said entry went on the record as a *prima facie* valid entry.

That being so, it follows, under the rulings of the Department, that until its cancellation on the public records, the land covered thereby is segregated from the public domain and is not subject to entry by another. *Whitney v. Maxwell* (2 L. D., 98); *St. Paul, M. & Ry. Co. v. Forseth* (3 L. D., 446); same company *v. Leech* (id., 506); *Pfaff v. Williams* and cases therein cited (4 L. D., 455); *Hollants v. Sullivan* (5 L. D., 115).

The records must be cleared by regular adjudication, before entry of the tract in question can properly be allowed.

Your office decision is affirmed.

RAILROAD GRANT—LEGISLATIVE FORFEITURE; ENTRY.

ST. LOUIS, IRON MT. & SOUTHERN RY. CO. *v.* FIGART.

Land included within an existing grant is not subject to any subsequent grant or appropriation.

The act of June 28, 1884, forfeited the grant made for the benefit of the Iron Mountain road, and confirmed entries theretofore allowed for lands within said grant.

Acting Secretary Muldrow to Acting Commissioner Stockslager, December 30, 1887.

I have considered the case of the St. Louis Iron Mountain and Southern Railway Company *v.* Andrew M. Figart, on appeal by said company from your office decision of June 4, 1886, rejecting its claim to the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 11, T. 25 N., R. 6 E., Ironton, Missouri, land district.

On February 9, 1853, a grant of lands was made to the States of Arkansas and Missouri to aid in the construction of certain railroads in said States (10 Stat., 155), which grant was revived and extended by the act of July 28, 1866 (14 Stat. 338). The land in question was not

within the original grant of 1853, but did fall within the indemnity limits of that grant as extended by the act of 1866. Hence, any rights the appellant may have in said land originated under said act of July 28, 1866.

The tract is within the ten mile (granted) limits of the grant of July 4, 1866 (14 Stat., 83), to the State of Missouri to aid in the construction of the Iron Mountain Railroad. Said tract being within the grant of July 4, 1866, was thereby excluded from the operation of the subsequent grant of July 28, 1866, under which the appellant claims.

The grant for the use of the Iron Mountain road was, by act approved June 28, 1884, forfeited, and the lands included restored to the public domain, with the following proviso: "That all pre-emption and homestead entries heretofore allowed upon any of said lands not in excess of the legal quantity be and they are hereby confirmed."

Andrew M. Figart, the homestead applicant, made entry for said land August 6, 1877, and on March 18, 1882, offered final proof, action upon which was suspended in your office, awaiting action by Congress affecting the railroad grants. The land having been included in the grant of July 4, 1866, was, so long as said grant remained in effect, protected from any other disposal or appropriation. Said grant remained in effect until revoked by the act of June 28, 1884, which said act of revocation also, by reason of the proviso hereinbefore quoted, confirmed the entry of the homestead claimant, Figart.

Your said office decision rejecting appellant's claim is therefore affirmed.

In your office decision it is said, "Should this decision become final, the question as to the sufficiency of the proof of Figart will be determined." Said proof has not been considered here, but is returned for appropriate action in your office.

RAILROAD GRANT—LEGISLATIVE FORFEITURE—HOMESTEAD ENTRY.

ST. LOUIS, IRON MT. & SOUTHERN RY. CO. v. MILLS.

On the forfeiture of a grant and confirmation of entries allowed of the granted lands, there is no reason why an entry of said land, improperly canceled, should not be re-instated.

A canceled entry within indemnity limits, re-instated prior to selection of the land by the company, excepts the land from any claim of the company pending action on the entry as re-instated.

A final certificate issued on proof received without authority is void.

Acting Secretary Muldrow to Acting Commissioner Stockslager, January 4, 1888.

I have considered the case of the St. Louis Iron Mountain and Southern Railway Company v. Milton R. Mills, on appeal by said company from your office decision of November 11, 1886, holding for re-instatement Mills's homestead entry for the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$

of the SE. $\frac{1}{4}$, Sec. 5, T. 24 N., R. 6 E., Ironton, Missouri, land district.

On February 9, 1853, a grant of lands was made to the States of Arkansas and Missouri to aid in the construction of certain railroads in said States (10 Stat., 155), which grant was revived and extended by act of July 28, 1866 (14 Stat., 338). The land in question was not within the original grant but did fall within the indemnity limits of that grant as extended by the act of 1866, and hence any rights the appellant may have in said land originated under said act of July 28, 1866.

The tract is within the twenty miles (indemnity) limits of the grant of July 4, 1866 (14 Stat., 83), to the State of Missouri, to aid in the construction of the Iron Mountain Railroad. Said tract being within the grant of July 4, 1866, was thereby excluded from the operation of the subsequent grant of July 28, 1866, under which the appellant claims.

The grant for the benefit of the Iron Mountain road was, by act approved June 28, 1884, declared forfeited, and the lands embraced therein restored to the public domain.

After the cancellation of two previous homestead entries of the land, Milton R. Mills made homestead entry therefor June 29, 1877. On June 21, 1878, his said entry was by your office held for cancellation for conflict with the grant to the St. Louis Iron Mountain and Southern Railway Company, and no appeal having been taken therefrom, his entry was canceled December 12, 1878. Notwithstanding this action in your office, the said Mills, on September 22, 1883, after due notice therefor, made final proof on his entry before the judge of the probate court of Butler county, Missouri, which proof was approved in the local office and final certificate issued thereon September 29, 1883. In accepting this proof the local officers, as said by you, exceeded their authority. The said proof having been taken without authority, the certificate issued thereon is void.

The appellant company not having made application to select the tracts in controversy here, prior to your action holding Mills's entry for re-instatement, any claim it may set up subsequently must be held subject to the disposition of his application for re-instatement.

It is unnecessary to discuss the question that would have been presented had the company made application to select these lands subsequent to the act of June 28, 1884, and prior to the action of your office holding Mills's entry for re-instatement, or his application therefor.

It is clear that at the date of the cancellation of Mills's entry, the St. Louis Iron Mountain and Southern Railway Company had no claim to the land, and therefore the action of your office canceling said entry, "for conflict with the grant to the St. Louis Iron Mountain and Southern Railroad Company," was in error. The question of re-instatement of said entry is one between Mills and the United States, and in view of the fact his entry had been allowed and that he was an actual settler, residing on the land at the date of the revocation of the grant to the Iron Mountain road, the only grant with which said entry could have

been in conflict, and the further fact that said act of revocation provided, "that all pre-emption and homestead entries heretofore allowed upon any of said lands, not in excess of the legal quantity, be and they are hereby confirmed," I can see no good reason why the action of your office canceling said entry may not properly be reviewed, said entry reinstated, and Mills allowed to submit final proof in compliance with the rules and regulations.

For the reasons herein stated, your office decision, holding Mills's entry for re-instatement, is affirmed.

HOMESTEAD CONTEST—ACT OF JUNE 15, 1880.

ROBERTS v. MAHL.

The rule laid down in *Friese v. Hobson* must govern in similar cases not then finally adjudicated.

Acting Secretary Muldrow to Acting Commissioner Stockslager, January 4, 1888.

On February 16, 1880, George Mahl made homestead entry for the S. $\frac{1}{2}$ of Sec. 26, T. 9 S., R. 3 W., New Orleans, Louisiana.

On October 4, 1884, John H. Roberts filed an affidavit of contest against said entry alleging abandonment. Hearing was had and the local officers rendered a decision adverse to claimant. Your office by letter of March 23, 1885, directed the dismissal of the contest on the ground of defective notice.

On November 13, 1886, the Department reversed said decision, and remanded the case for rehearing.

On March 16, 1887, the rehearing was had, and from the testimony submitted I am clearly of the opinion that the allegation of contestant was maintained.

It appears that on or about April 12, 1883, the entryman Mahl died, and on January 14, 1885, pending the contest, his widow, Antoinette Mahl was allowed to purchase under section two of the act of June 15, 1880.

Your office by letter of September 19, 1887, held that the widow was not entitled to purchase under said act pending the contest, and held the entry for cancellation.

The full claim of the appellant is set out in the words of the appeal, as follows:

The Honorable Commissioner erred in deciding this case under the ruling announced in *Freise v. Hobson* (4 L. D., 580) under date of June 21, 1886, inasmuch as the purchase was made by appellant and consummated January 14, 1885, under the interpretation given the second section of the act of June 15, 1880, in the case of *Gohrman v. Ford* (8 C.

L. O., 6), dated March 12, 1881, wherein the doctrine was maintained that a purchase of the land in contest prior to final judgment worked a dismissal of such contest and secured the land to the purchaser.

This contention cannot be maintained. It is the precise claim urged by Hobson in the case above cited in support of his entry. He purchased before the claimant in this case on November 22, 1884, and relied on the ruling in *Gohrman v. Ford*. That case was overruled in *Freise v. Hobson*, as follows:

The case of *Gohrman v. Ford*, *supra*, and cases following it, in as far as they conflict herewith are hereby overruled. This decision will not affect in any manner cases that have been finally adjudicated.

As this case had not been finally adjudicated it is ruled by the decision in *Freise v. Hobson*.

Your said office decision is accordingly affirmed.

PRIVATE CLAIM—CONFIRMATION BY STATUTE—SCRIP.

JEAN PIERRE CLOUTIER.

A private claim confirmed by the final decision of the commissioners appointed under the act of March 3, 1807, is in effect confirmed by act of Congress, and, not having been located, is accordingly within the intent of the act of June 2, 1858, providing for the issuance of scrip in satisfaction of unlocated claims confirmed by statute.

Acting Secretary Muldrow to Acting Commissioner Stockslager, January 4, 1888.

October 4, 1872, C. D. Gilmore purchased at succession sale, held in pursuance of a decree by the parish court in and for the parish of Catahoula, in the State of Louisiana, the "unlocated and confirmed private land claim against the United States for six hundred and forty acres of land founded on a settlement, in the old county of Natchitoches, Louisiana, pertaining to the succession of Jean Pierre Cloutier."

May 28, 1886, the United States surveyor general at New Orleans transmitted to you for authentication eight certain certificates of location duly issued by him "under the third section of act of June 2, 1858 (11 Stat., 294), in full satisfaction of the confirmed, but unlocated, land claim of Jean Pierre Cloutier, entered in the decisions of the old board of Land Commissioners, for the Western District of Louisiana, and confirmed in pursuance of authority conferred upon them by the fourth section of the act of March 3, 1807, entitled an act respecting claims to lands in the Territories of Orleans and Louisiana, as appears by their confirmation certificate, B. No. 1863, dated February 7, 1812, American State Papers, Green's Ed., Vol. 2, p. 718."

Your decision of June 3, 1886, holds for cancellation said certificates of location, for the reason that said claim "having been confirmed by a

board of commissioners, and not directly by an act of Congress, was not entitled to satisfaction with scrip," under the act of 1858, *supra*.

The case is here on appeal by said Gilmore, claiming as legal representative of Cloutier.

In his letter of transmittal, the surveyor-general expressly states that said claim is unlocated. This finding being uncontroverted, I assume such to be the fact, in accordance with the rule laid down in Stephen Sweayze (5 L. D., 570).

The third section of the act of 1858, under the provisions of which these certificates were issued, provides, *inter alia*, that

When any private land claim has been confirmed by Congress, and the same in whole or in part has not been located, or satisfied, for any reason other than a discovery of fraud . . . it shall be the duty of the surveyor-general to issue to the claimant or his legal representatives a certificate of location for a quantity of land equal to that so located and unsatisfied.

As the essential requisite to the issuance of such certificate, it remains to be determined whether or not said claim has been confirmed by Congress within the meaning of the act of 1858.

Section four of the act of March 3, 1807 (2 Stat., 440), provides:

That the commissioners appointed or to be appointed for the purpose of ascertaining the rights of persons claiming land in the territories of Orleans and Louisiana shall have full power to decide according to the laws and established usages and customs of the French and Spanish governments, upon all claims to lands within their respective districts, where the claim is made by any person or persons, or the legal representative of any person or persons, who, on the twentieth of December, 1803, were inhabitants of Louisiana, and for a tract not exceeding the quantity of acres contained in a league square, and which does not include either a lead mine or a salt spring, which decision of the commissioners when in favour of the claimant shall be final against the United States, any act of Congress to the contrary notwithstanding.

The said commissioners, February 7, 1812, by certificate duly issued, set forth that "Jean Pierre Cloutier, of the county of Natchitoches, is confirmed in his claim to a tract of land containing about 750.27 superficial arpens, equal to six hundred and forty American acres, founded on settlement and cultivation by the claimant on and about seven consecutive years previous to the 20th of December, 1803, as appears by the proof given in the claim, situate in the county of Natchitoches, on both sides of Red River, being bounded," etc.

The several acts of March 26, 1804, Sec. 14 (2 Stat., 283); March 2, 1805, Sec. 2 (2 Stat., 324); April 21, 1806 (2 Stat., 391), seem to indicate that it was the purpose of Congress to recognize as entitled, *prima facie*, to confirmation the title of persons who were actual *bona fide* settlers, agreeably to the provisions of said acts, prior to the acquisition of the territory of Orleans and Louisiana by the United States.

In accordance with such purpose, Congress, by the fourth section of the act of March, 1807, *supra*, vested in the commissioners, appointed

in pursuance thereof, the power to determine finally as against the United States the claims that were valid by reason of such actual settlement.

In transmitting the report of said commissioners, made October 16, 1812, to the Hon. President of the Senate, by letter dated June 9, 1813 (*Am. State Papers, Green's Ed., Vol. 2, p. 616*), the Commissioner of the General Land Office, referring to the said act of March 1807, says :

By the eighth section they (the commissioners) are directed to make report of all claims which they may not have finally confirmed in conformity with the said fourth section. . . . Their reports were by law directed to be made under three general heads.

Of these the first comprised

Those which in their opinion ought to be confirmed in conformity with the several acts of Congress for ascertaining and adjusting the titles and claims to land within the Territories of Orleans and Louisiana.

In further describing the report so transmitted, the said letter says :

Of the first class of claims none are reported because it is presumed they have been included in the commissioners' final confirmation.

It would seem therefore that the admitted purpose of Congress was to clothe the commissioners under the act of March, 1807, *supra*, with the power of final confirmation, and after favorable action as evidenced by their (the said commissioners) certificate duly issued, the claimant's title would stand confirmed by Congress.

In view of the foregoing, I can not concur in your conclusion that the claim now before me was confirmed by the commissioners and not by statute within the meaning of the act of 1858. The final decision of the commissioners under said act, to the effect that the Cloutier claim was based upon actual settlement, was the accomplishment of the legislative design that claims so ascertained shall stand confirmed.

For the reasons given, I consider the claim of Cloutier "confirmed by Congress," within the meaning of the act of June, 1858, *supra*.

Your decision is accordingly reversed.

TIMBER TRESPASS—RAILROAD RIGHT OF WAY ACT.

DENVER & RIO GRANDE RY. CO.

Railroad companies under the act of March 3, 1875, have only the right to take timber from the public lands for the construction of that portion of the road adjacent to the lands from which the timber is taken, and timber so taken can not be used for the purpose of repairs.

Acting Secretary Muldrow to the Attorney-General, January 5, 1888.

I have the honor to transmit herewith a copy of a letter from the Acting Commissioner of the General Land Office dated the 31st ultimo, with a report of special timber agent, Arthur Grabowskii, of December

13th, *idem*, relative to an unlawful appropriation of timber from public lands in Colorado.

It is shown by these papers that during the years 1835 and '86 George P. Jones and David E. Huyck, of Red Cliff, Colorado, cut and removed from vacant public lands in townships 6, 7, 8, and 9 south, range 80 west, said State, about 200,000 railroad ties—spruce and pine—which they sold and delivered to the Denver and Rio Grande Railway Company, the price received from the Company being fifty cents per tie delivered on its line of road.

The agent says the trespass was willful on the part of Jones and Huyck, and that the railroad company received the ties with guilty knowledge. The trespassers are not responsible financially, but the railway company is considered solvent. Witnesses are named who are relied upon to prove the acts constituting the trespass, and the receipt of the ties by the company.

On August 27th 1887 Judge Hallett rendered an opinion in the U. S. district court for Colorado, in the case of the United States *v.* this railway company, for timber trespass, in which he held that the company had a right under the special granting act of June 8, 1872 (17 Stat., 339) and the supplemental act of March 3, 1877 (19 Stat., 405) to take timber for the construction and repair of its road from lands adjacent thereto; that this privilege ceased on June 8th 1882, so far as it related to that portion of the company's road not completed on that date; that while the company could not take timber from the public lands under the granting act of June 8, 1872 and its supplement of March 3, 1877 for the construction of that portion of its road not completed on June 8, 1882, it might take it under the provisions of the act of March 3, 1875 (18 Stat., 482) known as the right of way act; that under the act of March 3, 1875 railroad companies have only the right to take timber from public lands for the construction of that portion of their lines of road adjacent to the lands cut from, the word "adjacent" meaning extending laterally some distance from the line of the road, and probably within ordinary transportation by wagons; and that timber so taken can not be lawfully transported to parts of the road remote from the place of cutting, and there used, nor can it be used for purposes of repairs.

The papers in this case show the cutting of the timber to have been done from August 1886 to September 1887, and along that portion of the line of road completed after June 8th 1882, so that if the company claims any right to cut the timber for construction purposes, it must be under the act of March 3, 1875.

The lands cut from are located along the portion of the road between Leadville and Red Cliff, which is shown to have been built and in running order before August, 1883, therefore the timber cut could not have been used for construction purposes on that portion of the road, but must have been used on some other part, more or less remote.

Under the facts as they appear, interpreted by Judge Hallett's view of the law as given herein, the appropriation of this timber by the railroad company appears to have been unlawful.

I therefore concur in the recommendation of the Acting Commissioner that civil suit be instituted against the Denver & Rio Grande Railway Company for the value of the timber involved, at the time and place of delivery, and to this end respectfully request that you will cause the papers herewith to be transmitted to the U. S. Attorney for Colorado, with directions to take such action, if, on examination of the facts, it shall appear to be justifiable and for the good of the public service.

Under the facts presented I agree with the special agent and Acting Commissioner in their recommendation that criminal suit against Jones and Huyck be waived, and they be used as witnesses in the action against the railway company.

PRIVATE ENTRY—RESTORED RAILROAD LANDS.

*WAKEFIELD v. CUTTER ET AL.**

Offered lands certified to a State under a railroad grant, and certified back to the government by the State, are taken by the government free of the offered condition that existed at the time of their certification to the State.

Under the statute by which the title to these lands was re-invested in the government, the Commissioner of the General Land Office was required to "re-offer for public sale in the usual manner the lands embraced in the list of surrendered lands aforesaid"; hence, prior to such re-offering said lands were not subject to private cash entry.

Secretary Lamar to Acting Commissioner Stockslager, January 6, 1888.

By decision of September 29, 1887, you refused the application of George M. Wakefield for the issuance of patent for private cash entry of the W. $\frac{1}{2}$ of W. $\frac{1}{2}$ Sec. 11, W. $\frac{1}{2}$ of W. $\frac{1}{2}$ and E. $\frac{1}{2}$ of E. $\frac{1}{2}$ Sec. 14, T. 42 N., R. 35 W., Marquette, Michigan, and held that the entry of Wakefield should be canceled, upon the ground that said lands were not subject to private cash entry. From this action Wakefield appealed.

The lands are covered by the applications of H. Cutter, Edward Frank and Charles Laydon to enter the same under the pre-emption law, which applications were rejected by the local officers, upon the ground that the land applied for had previously been sold to Wakefield under his private cash entry aforesaid.

The tracts in controversy are part of an odd section within the common limits of the Marquette and State Line and Ontonagon and State Line railroad grants, made by act of June 3, 1856 (11 Stat., 21).

In 1853 these lands were offered at public sale, and remaining undisposed of were afterwards subject to private cash entry at one dollar and

* See *Sipchen v. Ross*, 1 L. D., 634; *Weimar et al. v. Ross*, 3 id., 129 and 441; *Pecard v. Camens*, 4 id., 152.

twenty-five cents per acre. In 1856 they were withdrawn from market for the benefit of the railroad grants, and the even sections were afterwards offered at public sale at the enhanced price of two dollars and fifty cents per acre, and all of such sections remaining unsold were thereafter subject to private cash entry at the enhanced price of two dollars and fifty cents per acre.

The joint resolution of Congress of July 5, 1862 (12 Stat., 620) authorized a change of route of the Marquette and State Line railroad, and provided that the *even* numbered sections should thereafter be subject to sale at one dollar and twenty-five cents per acre.

The odd numbered sections along the old line of road had been selected by and certified to the State according to the terms of the grant. As to these lands the joint resolution provided that upon relinquishment being made by the State of all title and claim to such lands that the State would be entitled to equivalent lands along the new line, and then provided for the disposal of such lands as may be surrendered by the State, as follows: "And it shall be the duty of the Commissioner of the General Land Office *to re-offer for public sale in the usual manner* the lands embraced in the surrendered lands aforesaid, when duly filed in his office as herein directed."

Pursuant to the joint resolution, relinquishments were made by the State of odd sections on the old line, and equivalent lands in lieu of the lands so relinquished were duly certified to the State.

The case of *Pecard v. Camens* (4 L. D., 152) involved the question as to the right to locate and make private cash entry of the *even sections* within the limits of the old line of the Marquette and State Line railroad after the passage of the joint resolution of July 5, 1862 (12 Stat., 620).

In that case it was held that where the even sections have been once offered, then increased in price and again offered, and while in that condition declared by Congress to be subject to sale at the first price, and private entries were allowed therefor without further offering, such entries are not void, but voidable, for the want of a restoration notice, and may be confirmed by the Board of Equitable Adjudication.

The entries of the even sections were held to be not void, because those sections had been once offered at public auction at the minimum price, being the price at which they were actually purchased, and had been continuously in the market from the first offering.

The offering at public auction being a condition precedent to the right of private entry, it was held that—

Until this condition has been performed, the power of the officers of the Land Office to sell at private entry does not attach, and their action, if not cured by other provisions of the law, would be void. But, after the condition has been performed, as in this case, the power does attach, and having once been rightfully vested in the officers, unless Congress saw fit to fix some further condition by which the power would be divested, the power would continue.

It is contended by counsel for appellants that the odd sections having been once subject to private cash entry at the minimum price, occupied the same status as the even sections, after the restoration of said lands to the public domain under the joint resolution of July 5, 1862, and that the ruling in the case of *Pecard v. Camens* as to the *even* sections applies to the odd sections as well.

The even sections had always been offered lands from the first offering, and were continuously subject to private entry as public lands of the United States. It was therefore held that the temporary withdrawal and increase of price did not require a second offering, but only the restoration notice required by departmental regulations, because "a temporary withdrawal for any purpose (without there be express statutory command) in the administration of the land office has never been construed to require a re-offering at public auction."

It is true that the odd sections had once been offered at the minimum price, and were subject to private cash entry at that price up to the time of the withdrawal of said lands for the benefit of the railroad, but the government subsequently divested itself of the title to said lands by certifying them to the State of Michigan, for the benefit of the Marquette and State Line Railroad. When the government was afterwards re-invested with the title to said lands, it was under an act that directed the Commissioner of the General Land Office to "*re-offer* for public sale in the usual manner the lands embraced in the list of the surrendered lands aforesaid."

When the government certified these lands to the State of Michigan, it parted with its right and title in them, and upon the restoration and certification of these lands to the United States by the State of Michigan, the government took them free from the condition that had attached to them prior to the certification to the State, and hence they were lands that had never been offered at public sale under the present title of the government.

As to the even sections, it was held in the case of *Pecard v. Camens* that there was no specific statutory requirement that said sections should be re-offered. As to the odd sections there was a direct statutory command that these lands should be re-offered at public sale by the very act authorizing the government to re-acquire title to them.

Entries of the even sections were held to be voidable only for want of the restoration notice, a mere department regulation, and were held to be not void because the condition precedent to the right of private entry having been performed, the power of the officers of the land office to sell at private entry attached, and having once rightfully vested, would continue, unless Congress saw fit to fix some other condition by which the power would be divested.

As to the odd sections, Congress fixed a further condition upon the re-acquisition of these lands, by requiring them to be re-offered at pub-

lic sale, and this re-offering at public auction was a condition precedent to the right of entry of said sections.

The ruling in the case of *Pecard v. Camens* does not apply to the odd sections, but, on the contrary, the reasons stated in said decision for sending the entries of the even sections to the Board of Equitable Adjudication furnishes a sufficient reason for refusing the present application.

The applications of Cutter, Frank and Laydon will be disposed of as directed by your decision of September 29, 1887, which is affirmed.

VACATION OF PATENT—REPORT OF SPECIAL AGENT.

BARTOLO VIGIL.*

The report of a special agent, to constitute sufficient ground for the recommendation of suit to vacate a patent, should, when not resting on the personal knowledge of the agent, be supported by at least two affidavits of persons having a personal knowledge of the facts relied upon to secure the vacation of the patent.

Secretary Lamar to Commissioner Sparks, December 4, 1886.

By letter of March 25, 1886, you transmitted to me certain papers, and recommended the institution of suit to procure cancellation of the patent issued on the homestead entry of Bartolo Vigil for the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 6, T. 23 N., R. 20 E., Santa Fe land district, New Mexico.

The entry was made February 7, 1882, claiming settlement May 1, 1866. After notice, final proof was made before the register and receiver, April 1, 1882; same day final certificate was given, on which patent was issued March 18, 1883.

Two witnesses and claimant testified to his settlement on the land in May, 1866, and to his continuous residence thereon with his wife and three children. The improvements were stated to be a dwelling house, corral, and fence, worth \$400; and forty acres cultivated for thirteen seasons; thus showing that the requirements of the homestead law had been fully complied with.

On January 24, 1886, special agent J. M. Smithee, made an examination in relation to said entry, and on February 3, following, reported that the foregoing statements were all false; that instead of Vigil and his family living upon and cultivating the land from 1866 to 1882, he never resided upon or improved it in any way, and that said entry was fraudulently made, in the interest and for the benefit of one Pedro Sanchez, to whom the land was sold on May 29, 1882; and who has the same inclosed as part of his cattle ranch.

* Omitted from Vol. 5.

In his report the special agent gives the names of three persons by whom, he says, these facts can be proved.

If the matters stated by the special agent be true, the entry and patent thereon were unquestionably obtained through unmitigated fraud and perjury, and should be set aside.

Beyond a knowledge of the condition of the land in January last, when it was visited—nearly four years after final proof was made—the special agent has no personal knowledge in regard to the facts on which his charges of fraud and perjury are based, and in the framing of them has relied entirely upon what he heard others say, who were not under oath at the time.

After all the formalities and prerequisites prescribed by law have been, apparently, complied with by the entryman, it seems to me it would be unwise to ask the Attorney General to begin proceedings to secure the cancellation of the patent, on the report of a special agent, based on hearsay, as to the matters which alone could bring about the result sought to be accomplished.

The agent gives the names of parties, who he says will prove the matters alleged. He should have gone further and furnished the affidavits of at least two persons, who would relate such facts, as came under their observation, tending to sustain the charges made.

If the facts thus disclosed are such as, uncontroverted, would present a case of fraud and perjury, suit will be recommended.

In the future you will please cause to be pursued, in similar cases, the course herein indicated, whenever such testimony is obtainable; and especially whenever the agent is unable to speak from personal knowledge and observation as to the material facts of the case.

FINAL PROOF—PUBLICATION OF NOTICE.

ANDREW SMEDSTAD.

The sufficiency of publication of final proof notice must be determined by the regulations in force when such advertisement is made.

Under the circular of October 1, 1880, the notice of final proof was sufficient if published weekly five times.

Acting Secretary Muldrow to Acting Commissioner Stockslager, December 2, 1887.

Since rendering my decision of November 19, 1887, in the appeal of Andrew Smedstad from your office decision of May 14, 1886, rejecting his final proof under homestead entry No. 4282, for the SW. $\frac{1}{4}$ of Sec. 32, T. 140 N., R. 49 W., 5th P. M., Fargo, Dakota, because notice was not published thirty days as required, my attention has been informally called to an oversight in your office and also here.

The publishers certificate shows that notice of intention to submit final proof was "printed and published in the Fargo Weekly Republi-

can four consecutive weeks, commencing on the 13th day of September A. D., 1882, and ending on the 11th day of October A. D., 1882 both inclusive." This certificate is contradictory on its face, since if the notice was published the first time on September 13, and the last time on October 11, there was necessarily five insertions instead of four as stated. It appears then that this notice was in fact published five weeks. Under the general circular of October 1, 1880, it is said as to the publication of notice for final proof, "a compliance with the law will require the notice to be published weekly five times." This rule was not changed until the circular of March 20, 1883, which held that a compliance with the law required the notice to be published once a week for six weeks.

This final proof having been made in October 1882, must be governed as to notice by the construction then in force. Under that construction the present notice was sufficient, and the final proof should be accepted.

The said departmental decision of November 19, 1887, is therefore vacated and declared void, and your said office decision of May 14, 1886, is reversed and it is directed that patent issue on said proof.

RESTORATION OF INDEMNITY LANDS—RULE OF MAY 23, 1887.

ORDER OF DECEMBER 15, 1887, MODIFIED.

Secretary Lamar to Acting Commissioner Stockslager, December 22, 1887.

By letter of December 15, 1887 (6 L. D., 419) it was directed "that all lands, heretofore withdrawn and held for indemnity purposes, under the grants to" the railroads mentioned in said letter, "be restored to the public domain, and offered to settlement and entry under the general laws, after giving the usual notice." Said order is hereby changed and modified, so that said lands shall be restored to the public domain upon the same terms and in the same manner as was directed to be done by my order of August 13, 1887, in relation to the indemnity lands withdrawn for the benefit of the Atlantic and Pacific Railroad Company; and the subsequent orders of August 15, 1887, in relation to other roads (6 L. D., 92).

In the list of roads, contained in my said letter of the 15th instant, and to which the said order was made applicable, was inadvertently included the Chicago, Milwaukee and St. Paul Railroad Company, and you were instructed to restore the lands theretofore withdrawn for the benefit of that road. You are now instructed to exclude said company from the operation of said order, inasmuch as said company is the successor of the McGregor Western Railroad Company, whose grant was made by act of May 12, 1864 (13 Stat., 72), which, by its terms, seemed

to operate as a legislative withdrawal of the lands embraced within its provisions when the map of designated route was filed.

In like manner was included in the same order the Cedar Rapids and Missouri River Railroad. You are now instructed to exclude this last road from the operation of said order so far as relates to lands withdrawn for its benefit under the act of June 2, 1864, the fourth section of which act seems to operate as a legislative withdrawal of the lands mentioned therein on filing the map of definite location of the modified line of route.

FRAUDULENT HOMESTEAD ENTRY—ACT OF JUNE 15, 1880.

J. B. HAGGIN.

An entry unauthorized by the party in whose name it is made is fraudulent and void at inception ; and the land covered thereby may not be purchased by transferee under section two of the act of June 15, 1880.

Acting Secretary Muldrow to Acting Commissioner Stockslager, January 4, 1888.

In the matter of the application of J. B. Haggin to purchase under the act of June 15, 1880, the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 24, T. 28 S., R. 24 E., Visalia, California, land district, appealed from the decision of your office, dated April 20, 1886, denying said application, the following are the material facts affecting the question of appellant's right to make such purchase :

On November 15, 1875, by the procurement of some one to the Department unknown, what purports to be an entry was made on the above described land—and a final certificate of entry obtained—in the name of Charlotte McCord, of Johnson county, Arkansas, under sections 2306 and 2307 of the Revised Statutes, granting to certain soldiers and sailors, and their widows, the right to make additional homestead entries.

On the same day a paper, purporting to be an application by said McCord to make the aforesaid entry, was filed in the Visalia, California, land office. I find also among the papers in the case one purporting to be the affidavit of said McCord, showing compliance with law as to an original homestead entry, and another purporting to be her corroborated affidavit, showing that she is, as a soldier's widow, entitled to the benefits conferred by said sections of the Revised Statutes. Neither of these papers bear any file mark, but they were presumably presented at the said land office by some one at the time said entry was made. I also find a paper bearing date October 18, 1875, purporting to constitute irrevocably N. P. Chipman, of Washington, D. C., the attorney in fact of said McCord, and empowering him to sell and convey any lands she may hereafter acquire under the provisions of section 2306 of the Revised Statutes of the United States, and releasing him from all claims

to the proceeds of such sales and all damages. The expressed consideration for this power of attorney is one hundred dollars.

I find also an instrument in writing, purporting to be a deed for the above described lands from said McCord by her said attorney in fact to the applicant J. B. Haggin. This instrument bears date January 3, 1876, and the expressed consideration for the same is one hundred dollars. The original name inserted in this instrument as grantee has been erased and that of the said Haggin inserted. No explanation is given for this erasure and insertion.

On May 22, 1885, the register and receiver at Visalia, California, were instructed by your office that the aforesaid entry "is based upon papers of doubtful execution for the reason that the same are all filled out and the signatures of the party and witnesses made by one and the same person, and you will so inform all parties in interest, and that sixty days from receipt of notice of this letter will be allowed within which to show cause why the entry should not be canceled."

On October 14, 1885, the entry was canceled, for the reasons above stated. On February 5, 1886, Haggin made application to purchase under the act of June 15, 1880. In his application he says that relying on the certificate of the United States Land Office, and believing that the said Charlotte McCord had made a valid entry of said land, he purchased the same, in good faith and for a valuable consideration.

It appears from a letter to you from the register of the Visalia land office, dated February 6, 1886, that, in April, 1881, the aforesaid N. P. Chipman applied for a return of the fee and commissions paid by him on said entry, amounting to twenty-eight dollars.

The foregoing are the material facts affecting the question of appellant's right to purchase said land, so far as they are shown by the record.

Appellant's attorneys on appeal take the position that the Commissioner erred in holding that "Haggin's application as a *bona fide* purchaser, after entry, is not within the act of June 15, 1880."

It seems to me that the Commissioner's letter of May 22, 1885, as quoted above, makes the charge that said so-called entry was made without the authority of said McCord, and was therefore fraudulent and void. It does not appear that any explanation of the fraud charged was made or attempted, and the appellant now seems to rely solely on his right as a *bona fide* purchaser after entry, and after the issuance of a final certificate in the name of his supposed grantor. His position seems to be that, admitting the entry to have been made without authority, and to have been fraudulent and void, still, as a *bona fide* purchaser, he is entitled, under the act of June 15, 1880 (21 Stat., 236) to said lands by paying the government price therefor. This position is untenable, and it is therefore unnecessary to discuss the question of appellant's good faith.

If the so-called entry was made without the authority of the party in whose name it was made, it was fraudulent and void at its incep-

tion. Such an entry does not come within the act of June 15, 1880, however innocent the applicant to purchase may be of participation in or of knowledge concerning the fraud. The doctrine of innocent purchaser does not apply in such cases, but that of *caveat emptor* does.

Your decision denying appellant's application to purchase said lands is affirmed.

SOLDIERS' ADDITIONAL HOMESTEAD—CERTIFICATE OF RIGHT.

JOHN E. COURTRIGHT ET AL.

On the cancellation of a soldier's additional homestead entry because the land was not subject thereto, the certificate of right, issued in accordance with existing regulations, should be returned without alteration.

Acting Secretary Muldrow to Acting Commissioner Stockslager, January 13, 1888.

On the 20th of April, 1887, the Department referred to your office for report a communication from A. A. Thomas Esq., of this city asking that the Commissioner of the General Land Office be directed to return to him intact the soldier's additional homestead certificates of John B. Courtright and others, that officer having refused so to do.

It appears from your report in this matter, dated December 27, 1887, that the right of John B. Courtright to make an additional homestead entry not exceeding eighty acres was duly certified by the General Land Office February 7, 1878, in the usual form and in accordance with practice then prevailing.

Prior to the year 1883, this certificate was located on a tract of land in the San Francisco district, California, as homestead entry No. 3295, final No. 1825, which entry was canceled December 11, 1884, because the land embraced in it was found by the Department to be a part of the Moraga Rancho. A note of cancellation was made on this certificate by your office, and under date of December 11, 1885, a new certificate was issued, which, unlike the other, contained what is familiarly termed the "life clause." Mr. Thomas as the locating agent and duly authorized attorney of record refused to receive this last certificate because it was not like the former one. He contended, and still contends that he is entitled to receive intact the original certificate, and that the Commissioner of the General Land Office has no authority to change said certificate or mutilate it in any manner.

The subject of additional homestead entries and the "life clause" in the certificate of additional entry were given a thorough consideration in the case of Lars Winqvist (4 L. D., 323). It was there held, (1) That the right to make an additional entry is personal and not assignable; (2) That a certificate showing the right to make such entry may properly contain the expressed condition, "if shown to be still living at date of application to enter in his name"; and (3) That this rule does

not apply to cases where the additional right has been certified prior to February 13, 1883, or to cases pending March 16, 1883.

Applying the ruling in that case to the facts in this one it would seem that Mr. Thomas is entitled to receive intact his original certificate issued in 1878. The fact that the entry made of lands in California was canceled because the land was not subject to entry can have no effect on the original certificate. That certificate having been issued in 1878 in exact accord with the rulings then in force should not now be changed in any manner but should be allowed to remain intact, and directions are given accordingly.

Other cases like this should receive equal treatment.

FINAL PROOF—EQUITABLE ADJUDICATION.

MICHAEL GERAGHTY.

Where the claimant, though exercising due diligence, was prevented by circumstances beyond his control from submitting final proof on the day named in his notice, and no protest against, or objection thereto appears to exist, the entry may be sent to the Board of Equitable Adjudication for confirmation.

Acting Secretary Muldrow to Acting Commissioner Stockslager, January 16, 1888.

In the case of Michael Geraghty appealed from the decision of your office dated May 6, 1887, the following are the facts affecting the question to be considered:

On April 4, 1884, Geraghty made homestead entry of the SW. $\frac{1}{4}$ or NE. $\frac{1}{4}$, the NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$, and N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 15, T. 30 N., R. 6 W., in the Olympia, Washington Territory, land district.

On December 31, 1886, he gave notice of his intention to make final proof "before the judge, or in his absence the clerk of the district court, at his office in Port Townsend, Washington Territory, on Saturday the 19th day of February, A. D., 1887."

The testimony of the claimant and his witnesses was taken before the officer designated but not on the day named in the notice, and for this reason the proffered proof was rejected by the local land officers and your office.

Appellant insists that as he used due diligence and did everything in his power to make proof on the day named, and was only prevented from so doing by "act of God", he is excusable, and should not be put to further expense in the matter. It is shown by the joint affidavit of W. B. Seymore master, and Henry Lewis, engineer of the steamer "Dispatch", that said steamer is the regular mail and passenger boat plying between Port Townsend, Washington Territory, and way ports

including Port Angeles, (where claimant resides), and that said boat offers the only regular mode of travel between said places. That on her trip February 17, 1887, from Port Townsend to Neah Bay and way ports, including Port Angeles, she got aground twice, encountered head winds and tides, and that when the steamer returned to Townsend bay the wind was blowing such a gale from the south east as to prevent a landing; that the boat was run on to Haddock and returned to Port Townsend later, when the winds had become more calm. That according to the schedule time said steamer on this trip was due at Port Townsend on Friday night February 18th, but because of the delay occasioned as related, she did not reach that place till nine o'clock A. M., on Sunday the 20th, and that on said trip the claimant and his witnesses came aboard at Port Angeles. Appellant swears that he and his witnesses reside at Port Angeles, thirty-five miles west of Port Townsend, and that the only mode of travel between the two places is by water, and the only means the said steamer "Dispatch", leaving Port Townsend on regular trips every Monday and Thursday and that he had no way of reaching Port Townsend except by said steamer, there being no road by land. That he relied on said steamer to convey him to Port Townsend on Friday night, February 18, 1887, but that said steamer was belated and did not arrive till nine o'clock on Sunday the 20th. That on Monday following he went before the officer named in his notice with his witnesses and that said officer took his proof as soon as he could; that there is no adverse claimant to said land, and that no person has objected to his making proof, and that the causes preventing him making proof on the 19th were entirely beyond his power and control.

James Seasey, clerk of said district court, certifies under seal of his office, that the claimant was prevented from making final proof on the day advertised by reason of the delay, beyond her regular time, of said steamer; and "that no person or persons appeared before me between the hours of 8 A. M., and 6 P. M., on Saturday, February 19, 1887, and on Monday, February 21, 1887, or at any other time, adverse to the claim of Michael Geraghty for" said land. (Describing the same.)

Under the facts and circumstances shown in this case, it seems to me that it would be inequitable to put appellant to further delay and expense in this matter, but under the regulations prevailing in the Department this would have to be done. However, as the case appears to be within the spirit of Rule 10 of the Rules of Equitable Adjudication, you will therefore please certify the case to the Board of Equitable Adjudication for the action of that tribunal.

Your decision is so far modified as to conform to this direction.

PRIVATE CLAIM—CALVE SURVEYS; REVIEW.

CHARLES P. CHOUTEAU ET AL.

The claim confirmed in the name of Calve was based upon his occupancy and cultivation, and such confirmation did not inure to the benefit of parties claiming under a prior concession made to said Calve but never confirmed.

As but one claim was confirmed in the name of Calve a decision by which the nature and correct location of the claim was finally determined is conclusive, so far as executive authority is concerned, as against parties asserting other and different rights derived through said Calve, and denying the correctness of the survey as finally approved.

A motion for review must be denied where it involves the reversal and disregard of repeated executive and judicial decisions, and the subject matter has passed beyond executive control.

Acting Secretary Muldrow to Commissioner Sparks, September 15, 1886.

December 11, 1884, Charles P. Chouteau and others filed in the Department a motion for review of the decision of my predecessor of November 7, 1884 (3 L. D., 177) affirming the decision of the Commissioner of the General Land Office rejecting their application for approval of survey No. 3309, in the Cul de Sac Common fields, St. Louis, Missouri.

Under a confirmation to Joseph Calve's representatives of a lot, 2 by 40 arpens, Deputy Surveyor J. C. Brown in 1835 made two surveys of tracts 2 by 40 arpens each, being a mile distant from each other and numbered 1583 and 3309, respectively. In May 1845 the surveyor general approved No. 1583 as the correct survey of the land confirmed to Calve. Survey No. 3309 has never been approved, but on the contrary has been treated by the surveyor general as null and void for want of confirmation, and the land covered by it has been patented in satisfaction of other claims.

No action looking to the approval of this survey seems to have been taken until January 6, 1874, when counsel in behalf of the heirs and legal representatives of Joseph Mainville, applied to Commissioner Drummond for an approval of survey No. 3309, alleged to be in satisfaction of the confirmation to Joseph Calve's representatives. They alleged that survey No. 1583 was erroneous and should not have been approved, and that survey No. 3309 was the correct location of the tract confirmed and should have been approved. The Commissioner declined to entertain the application, holding that the matter had passed beyond his jurisdiction, for the reason that survey No. 1583 had been approved as the correct location of the tract confirmed to Calve, and that survey No. 3309 has never been approved, but on the contrary has been considered null and void for want of confirmation, and that it is covered by survey No. 2498 under New Madrid location certificate in the name of James Y. O'Carroll.

No appeal was taken from this refusal, but in 1882 they renewed their application, which was rejected by Commissioner McFarland. Upon appeal my predecessor affirmed that decision, upon the ground that the decision of Commissioner Drummond, affirming survey No. 1583 and holding the survey No. 3309 had never been approved, but was covered by another survey No. 2498, under which patent had issued, was a final decision binding on the applicants, and their failure to appeal therefrom was a waiver of any rights claimed by them.

Applicants now ask that this decision be reviewed, upon the ground that no submission had been made to Commissioner Drummond of the rights claimed by Mainville and that no adjudication of the rights claimed for the heirs and representatives of Mainville has ever been made.

A brief review of the history of this case from the original concession to Calve is necessary, in order to arrive at a correct understanding of the issues involved.

On April 30, 1768, there was conceded to Calve in fee simple a tract of land 2 by 40 arpens, situated in the Grand Prairie, bounded on one side by Widow Marechal and on the other side by Little River, under the condition to settle upon said land within a year and a day. This concession was recorded in Land-Book No. 1, page 17.

On September 28, 1768, all of Calve's property, including this tract of 2 by 40 arpens, was sold at public sale by virtue of a decree against Calve in favor of certain parties, on account of the robbing of said parties by Calve who had fled from justice. There seems to be no question that the sale made under the decree divested Calve of all right and title to said grant, and vested whatever right he had thereunder in the purchasers at said sale.

At this sale Valean became the purchaser who conveyed through Lachance to Joseph Mainville. Mainville's heirs and Chouteau, a purchaser from one of said heirs, appear as the present claimants.

It appears that during or before the year 1776 Calve returned to St. Louis and cultivated land situated in the Grand Prairie. What land Calve then cultivated seems to be a question of some doubt, but that it was not the tract originally granted to him seems to admit of but little, if any, doubt.

From the record in this case I think it may be safely assumed that at the date of the cession of Louisiana to the United States all right, title and interest of Calve, acquired by virtue of the concession of April 30, 1768, was then vested in Joseph Mainville, and under the act of 1805 he or his representatives were entitled to confirmation of such title by complying with other provisions of the act, as to proof, etc. That prior to December 20, 1803, Calve had inhabited, possessed and cultivated a tract of land in the Grand Prairie other than the tract conceded to him in 1768.

Lengthy and elaborate arguments have been filed by applicants through the various stages of this case to show that the tract of land

designated as survey No. 3309 is the tract of land that was conceded to Calve in 1768 and not the tract known as survey No. 1583, and that this latter tract was the land confirmed to Hervieux by Recorder Bates February 2, 1816.

For the sake of argument, it may be admitted that the tract known as survey No. 3309 was the land conceded to Calve.

Admitting also that the tract known as survey No. 1583 was the land conceded to Hervieux and that a confirmation was made to Hervieux, with other village claims, under the act of June 13, 1812 (2 Stat., 748) referring to the original concession, yet no one has appeared to claim the benefit of that confirmation. As to the occupancy of this lot by Calve, Surveyor General Loughborough, in his report of January 30, 1855, says that in 1844 Antoine Smith testified under oath that the tract known as survey No. 1583 included Calve's original improvements; that Calve was the uncle of his (Smith's) wife, and that he had worked two years on Calve's land. Again, he says: The inventory of Hervieux's property December 4, 1775, shows that he died prior to that date, and "that this tract was probably abandoned, which enabled Calve to take possession of it when he returned to St. Louis in 1776."

While it may be true that the land covered by this survey was the land conceded to Hervieux, and that a village lot was confirmed to him under the act of June 13, 1812, there is no evidence that he was occupying and cultivating this lot prior to 1803, or claiming it in any manner whatever, nor is there any evidence that Calve was not the last inhabitant occupying and cultivating it prior to December 20, 1803. I think it may also be safely assumed that Calve had inhabited occupied and cultivated the tract known as survey No. 1583 prior to December 20, 1803.

The act of March 2, 1805, (2 Stat., 324) and the acts of 1806 and 1807, amendatory thereof, provided for the confirmation of incomplete claims under French or Spanish authority held by persons residing in the territory ceded by the French government to the United States by the treaty of April 30, 1803, provided said lands were prior to October 1, 1800, actually inhabited by such persons or their representatives. By submitting proof and bringing himself within the provisions of the act, Mainville or his representatives would have been entitled to confirmation of the concession to Calve of 1768.

The act of June 13, 1812, provided:

That the rights, titles and claims to village lots, out-lots, field lots, and commons in adjoining and belonging to the several towns or villages of . . . St. Louis . . . in the Territory of Missouri, which lots have been inhabited, cultivated or possessed prior to the 20th day of December, 1803, shall be and the same are hereby confirmed to the inhabitants of the respective towns or villages aforesaid, according to their several right or rights in common thereto. Provided, that nothing herein contained shall be construed to affect the rights of any persons claiming the same lands or any part thereof, whose claims have

been confirmed by the board of commissioners for adjusting and settling claims to land in said territory.

The act further provided that persons claiming lands who had not heretofore filed notice of such claims with the Recorder of land titles should be allowed until December 12, 1812, to file such notice, and that the Recorder should have the same powers under said act as the board of commissioners had under the former acts.

This act clearly contemplates that confirmation should be made to settlers by reason of cultivation, inhabitancy and possession alone, and not by virtue of any former concession, because such settlers were confirmed in their right to such land by reason of cultivation, inhabitancy and possession, unless the title to such land had previously been confirmed to another under the acts of 1805 and the acts amendatory thereof.

It is claimed by applicants that under the acts before cited, the legal representatives of Joseph Mainville filed notice of their claim under the grant recorded in Land-Book No. 1, page 17, and made proof of cultivation prior to December 20, 1803.

This statement is not confirmed by any evidence contained in the record. In fact, there is no evidence of any notice having been filed by any one upon which this confirmation to Calve was made, or to show with any certainty how it came before the Recorder, or by whom it was presented.

Counsel for respondents suggests that it seems to be conceded that at the suggestion of a number of citizens of St. Louis Recorder Bates considered as formally presented the concession in Land-Book No. 1, from pages 1 to 35, inclusive, and took testimony in gross in regard to them, the individual claimants then holding under such concessions not appearing.

There is nothing in the record to contradict this suggestion, and the liberal and informal manner by which every one who appeared to have any claim or show of right under the act was confirmed in their title, seems to confirm this theory.

In the report of Recorder Bates made to the Commissioner February 2, 1816, on the confirmation of village claims under the act of June 13, 1812, proven before January 1, 1814, appears the following :

Concession warrant or order of survey and by whom, Private Land-Book, Vol. 1, Page 17.

Survey, Not platted.

Claimant's name, Joseph Calve's representatives.

Quantity claimed, 2 by 40 arpens.

Situation, Out Lot, B. Prairie, St. Louis.

Acts of ownership, Possession & cultivation prior to 1803.

Opinion of Recorder, Confirmed ; 80 arpens to be surveyed.

And in Recorder Bates's Minutes, page 133, the following :

"Joseph Calve, claiming 2 by 40 arpens, Big Prairie field, St. Louis, Con. No. 1, folio 17, August Chouteau sworn, says, this lot was cultivated forty years ago and till fence was taken down. Cou'd O. S."

By the act of April 29, 1816, (3 Stat., 328) Congress confirmed all claims recommended for confirmation by Recorder Bates in his report of February 2, 1816. It therefore appears that under the act of 1805, Mainville was entitled to confirmation of the tract of land embraced in the concession to Calve upon complying with the provisions of said act, and that if Calve was inhabiting and cultivating another and different tract of land prior to December 20, 1803, he would also be entitled to confirmation of said tract, if such tract had not been confirmed to another by the board of commissioners under the act of 1805 and the acts amendatory thereof.

The right of Mainville under his purchase of the concession to Calve did not in any manner affect Calve's right to confirmation of another tract by reason of inhabitancy and cultivation, and his right under the act of 1812 was not in any manner dependent upon the concession to him in 1768.

It is admitted that there was but one concession to Calve, and but one confirmation in his name. Therefore the controlling question presented in this case is, what tract of land and for whose benefit was the confirmation made.

It appears that the Recorder's attention was called to the right or claim of Calve by reference to the Land-Book containing the record of concession to Calve, but it is clear that the tract was confirmed to Calve by reason of inhabitancy and cultivation prior to 1803, and that the land last inhabited and cultivated by Calve was not the land conceded to him in 1768.

How then can it be said that a confirmation to Calve under the act of 1812 by reason of possession and cultivation alone and without regard to the origin of title can inure to the benefit of Mainville, who was in no sense the representative of that right of Calve?

In the case of *Page v. Scheibel* (11 Mo., 167) the question as to whether survey No. 1583 was a correct location of the confirmation to Calve was directly involved. In that case the court below instructed the jury that "if they believe from the evidence that Calve or his legal representatives prior to December 20, 1803, inhabited, cultivated or possessed a common field lot in the Grand Prairie Common fields of St. Louis, and that the premises in question are a part of the same lot so cultivated or possessed," they should find for the defendant. The jury found for the defendant, and the case was taken to the supreme court by writ of error, which court affirmed the judgment of the court below and held that the Recorder had no authority for confirming village lots, because of a concession, but solely on the ground of inhabitancy, possession and cultivation previous to December 20, 1803, which were the only requisites to a confirmation under the act. The court further says: "Can it be doubted that the lot confirmed by the Recorder is the lot which the claimant actually occupied? It was this lot which the Recorder was authorized to report for confirmation, and in the absence of any proof of inten-

tion on his part to overstep the limits of his authority, we will presume that such was not his intention." The principle announced in this decision was concurred in by the supreme court of the United States in the case of *Guitard v. Stoddard* (16 Howard, 494).

The question as to the validity of this survey and as to its being the correct location of the tract confirmed to Calve has not only been fully and finally decided by the Department, but is well settled upon principle by the decision of *Page v. Scheibel*, above cited.

While it is true that a confirmation to Calve under the act of June 13, 1812, of the tract inhabited and cultivated by him prior to 1803 is not in satisfaction of any claim or right of Mainville, derived through purchase of the concession to Calve in 1768; yet a decision holding that the tract reported by Recorder Bates for confirmation was for the benefit of Calve by virtue of his possession and cultivation, and that survey No. 1583 correctly locates the land so confirmed, is practically a decision upon the rights claimed by the heirs and legal representatives of Mainville, because the failure to apply for a confirmation of the tract claimed by them under the act of 1805, by virtue of the concession to Calve, or under the act of June 13, 1812, by reason of his (Mainville's) inhabitaney and cultivation of said tract, has barred them from now asserting their right to a survey of said tract, or to the approval of the survey made by J. G. Brown as survey No. 3309, said claim not having been confirmed.

Admitting, for the sake of argument, that the rights claimed by the heirs and representatives of Mainville were not submitted to the Commissioner for definite action and decision therein when he rendered his decision of August 18, 1874, yet a decision upon the matter therein submitted by applicants to Commissioner Drummond necessarily involved a decision upon such rights or claims. Independent of this view, the fact that survey No. 1583 has for more than fifty years been recognized and decided by the courts, and the Department, to be the correct location of the tract confirmed to Calve, and that such confirmation was not for the benefit of Mainville as assignee of the rights of Calve under the concession made in 1768, and the further fact that survey No. 3309 has been declared to be of no effect for want of confirmation, and that the land covered by such survey has been patented to others under a New Madrid location after decision by the Department that no valid claim interfered with it, are sufficient reasons for refusing this application.

The motion for review is denied.

SAME, ON REVIEW.

Secretary Lamar to Acting Commissioner Stockslager, January 6, 1888.

It appears that on January 6, 1874, Messrs. Williams and Tittman, attorneys-at-law, St. Louis, Missouri, applied to your office in behalf of

the heirs and legal representatives of Joseph Mainville, alleged to be owners of a tract of land two by forty arpens in size, situate in the Cul de Sac common fields of the City of St. Louis, for approval of a survey thereof, number 3309, made by U. S. Deputy-Surveyor Brown in 1835, which they claimed was reported for the confirmation to Joseph Calve's representatives, by Recorder Bates's report of February 2, 1816, and confirmed by act of Congress of April 29, 1816 (3 Stat., 328).

They also allege that another survey of the same tract was made by the same surveyor, in the name of the same Calve, numbered 1583, which was approved by Surveyor-General Reed, and claimed to be in satisfaction of the confirmation of Calve's representatives, which survey they alleged was erroneous, and should not have been approved; but that survey No. 3309 was the correct location of the confirmed tract and should be approved; and they asked opportunity to prove their allegations, and for patent under the last-named survey.

Under date of April 18, 1874, the Commissioner held in his decision that it appeared from an examination of his records that the claim of Joseph Calve's representatives for a tract of land (by virtue of a concession to Calve made by the French government in 1768) of two by forty arpens, equal to eighty arpens, is entered as No. 185 in the report of February 2, 1816, of Frederick Bates, then Recorder of land titles for the Missouri Territory, entitled "confirmation of village claims under act of Congress of the 13th of June, 1812," wherein it is described as an out lot (Big Prairie), St. Louis, and was confirmed to him for eighty arpens, and, subsequently, by the act of Congress approved April 29, 1816. The decision further states that it appeared that under this confirmation two surveys were made, each for two by forty arpens, namely, No. 1583, in the Grand Prairie common field, and No. 3309 in the Cul de Sac Prairie common field; and that survey No. 3309 is covered by survey No. 2498, under New Madrid location certificate No. 150, in the name of James Y. O'Carroll; and, also, as appeared from a letter dated July 30, 1845, from Surveyor-General Conway to the Commissioner upon the subject of interference with the survey of the O'Carroll claim, that survey No. 3309 has never been approved, but on the contrary was considered to be null and void for want of confirmation. The decision also stated that this opinion of the surveyor-general seemed to have been acquiesced in and adopted by the General Land Office, as survey No. 2498, under the name of the New Madrid location certificates in the name of O'Carroll, was patented June 10, 1862, in favor of Mary McRee as assignee in right of O'Carroll. In consideration of these facts, the Commissioner held that the matter had passed beyond his jurisdiction, and refused the application.

This decision of the Commissioner embraced all the material points raised by the application, affirming survey No. 1583, which was approved by the survey-general, and holding not only that survey No. 3309 had never been approved, but that it was covered by another sur-

vey, No. 2498, under which patent had issued. No appeal was taken from this decision, nor was objection made thereto, until eight and one-half years later, to wit: November 14, 1882, when another application for approval of survey No. 3309, and for a review of the Commissioner's decision of April 1874, was filed before Commissioner McFarland (3 L. D., 177.)

Their application was a second time rejected, July 30, 1883. From this last rejection they appealed to the Secretary of the Interior, who confirmed the decision of Commissioner McFarland, refusing to approve of said survey No. 3309.

On December 11, 1884, the applicants in this case filed in the Department a motion for the review of said decision of Secretary Teller of November 7, 1884.

On September 15, 1886, after elaborate oral argument before the present Secretary of the Interior and First Assistant Secretary Muldrow, the latter, as Acting Secretary, rendered a decision denying said motion.

Inasmuch as counsel who represented such motion for review have vigorously challenged certain material statements of fact and the conclusions therefrom, contained in said decision of September 15, 1886, it was suspended by Mr. Muldrow to await my personal examination and consideration of such alleged errors.

I have therefore re-examined the entire record with great care, and in addition to the very full arguments, both oral and printed, previously presented, I have had the benefit of searching and unrestrained criticism of the decision of the Acting Secretary in three different briefs by all the counsel of record for Chouteau *et al.*

The Acting Secretary found, in substance: That on April 30, 1768, there had been conceded to Joseph Calve a certain described and duly recorded tract of land under the condition to settle there within a year and a day; and that on September 28, 1768, Calve having then absconded, his interest in that tract was sold at public auction by virtue of a decree against Calve in favor of certain parties. The title acquired by this judicial sale passed by proper chain of conveyances to the heirs of Joseph Mainville and to Charles P. Chouteau, a purchaser from one of the said heirs. That during or before the year 1786 Calve returned to St. Louis and inhabited, cultivated or possessed a different tract of land from that embraced in his original concession.

And so the facts stood at date of the cession of Louisiana to the United States.

That under the act of Congress of 1805 the heirs of Mainville would have been entitled to confirmation of the tract covered by the original concession and inuring to them through said judicial sale upon their complying with the other provisions of that act as to proofs, etc.

That under the act of Congress, June 13, 1812, Calve was entitled to confirmation of the other tract "inhabited, cultivated or possessed by him prior to December 20, 1803.

That neither the Mainville heirs nor Calve gave the requisite notices nor applied for confirmation of either tract; but that at the suggestion of a number of citizens of St. Louis, Recorder Bates considered as formally presented all the concessions in Land Book No. 1, from pages 1 to 35, inclusive, and took testimony in gross in regard to them, the individual claimants not appearing.

That in the report of February 2, 1816 of Recorder Bates to the Commissioner of the General Land Office, appears the following :

Concession, warrant or order of survey and by whom, Private Land Book Vol. 1 p. 17.

Survey, Not platted.

Claimant's name, Jos. Calve's representatives.

Quantity claimed, 2 by 40 arpens.

Situation, Out Lot B. Prairie, St. Louis.

Acts of ownership, Possession and cultivation prior to 1803.

Opinion of recorder, Confirmed. 80 arpens to be surveyed.

In Recorder Bates minutes, page 133, appears the following :

Joseph Calve, claim 2 by 40 arpens, big prairie field, St. Louis. Con. No. 1, folio 17, Auguste Ohouteau, sworn, says this lot was cultivated 40 years ago and until fence was taken down. Confd. O. S.

That as there was but one tract recommended for confirmation to Calve or his representatives, the question then arose whether it was the tract embraced in the original concession to Calve or the tract subsequently "inhabited, cultivated or possessed" by him.

That in 1835 Deputy Surveyor J. C. Brown surveyed two different tracts, 2 by 40 arpens each distant one mile from each other, one numbered 3309, representing the original concession, and the other 1583, representing the subsequent possession and cultivation.

That in 1845 the surveyor general approved number 1583 as the correct survey of the land confirmed to Calve and a certified copy of such plat and description having been received by the Recorder of Land Titles, that officer, on May 24th 1845, issued and delivered his patent certificate thereon as required by the 3rd section of the act of April 29th 1816.

That survey No. 3309 was never approved, but on the contrary has been treated as null and void for want of confirmation, and the land covered by it has been patented by the United States to other parties in satisfaction of other claims.

That by a series of subsequent executive and judicial decisions the correctness and the conclusiveness of the aforesaid executive action, in satisfying the confirmation to the representatives of Joseph Calve by the approval of survey No. 1583 and the issue of the requisite evidence of title thereto, has been decisively affirmed, so that the matter long since passed out of the jurisdiction of this Department.

Counsel assail the correctness of this conclusion upon the principal grounds, first—

That the confirmation by Recorder Bates was to Joseph Calve's representatives; that the Mainville heirs alone filled that description and

to the exclusion of the heirs of Calve; that the Mainville heirs alone were the parties who applied for confirmation. That hence Recorder Bates unquestionably reported claim No. 3309 for confirmation and equally true that that claim alone was confirmed by the act of 1816 to the Mainville heirs.

Second: That the proof of possession and cultivation prior to 1803, upon which the confirmation was recommended by Recorder Bates, applied to the original concession tract represented by survey No. 3309, and has been in entire error held and applied to the tract embraced in survey No. 1583.

After most careful examination of the record in this case, I discover no support for many of the assertions of fact by counsel and their conclusions appear to me unsound. The heirs of Mainville were Joseph Calve's representatives *only as to* the interest owned by him at the time of the judicial sale in the tract covered by the previous concession to him. They were not his representatives *generally* nor as to any other interest in another tract. Succeeding to his interest in the tract covered by the original concession, they could have secured confirmation to themselves of such original concession by making application in accordance with the requirements of the act of March 2, 1805, and the amendatory acts of 1806 and 1807, and by proving actual inhabitancy prior to October 1, 1800. But they presented no claim for such confirmation. By virtue of their purchases at the judicial sale they became the representatives of Calve, *quoad* the tract of land embraced therein; but certainly not as to a different tract to which his right was initiated nearly twenty years later by the mere fact of inhabitancy, cultivation or possession.

Possibly the Mainville heirs might have successfully presented a claim in their own right for confirmation under the act of June 13, 1812, if they could have proven the requisite acts of inhabitancy, cultivation, or possession prior to December 20, 1803. Counsel assert very roundly that the Mainville heirs, the representatives of Calve in the concession, did apply for confirmation. I am, however, unable to find any evidence outside of the terms of the confirmation itself that they did present such a claim to Recorder Bates for confirmation, or that they had knowledge that a claim on behalf of Calve had been presented. On the contrary, I find it stated by the supreme court of Missouri, in a case involving the validity of survey No. 1583, that "it appears (from the minutes of the Recorder) that on the 28th of _____, 1812, Th. F. Ridlik and others filed in the office of the Recorder a paper requesting him to record the registered concessions number 1, 2, 3, 4, 5, and 6 in *livre terrain*." These minutes showing that Recorder Bates took jurisdiction of the Calve claim (which numerous others recorded in *livre terrain*) at the request of the prominent citizens of St. Louis negative the theory of an actual and personal presentation of such claim. Surveyor-General Loughborough, in his report of the 30th of June, 1855,

after citing certain pages in the report of Recorder Bates, says, "from this it is believed that many confirmations were thus made without any person claiming them."

Under the circumstances of such an application by the general body of citizens the term "Joseph Calve's representatives" was obviously used as a term of general description rather than in the restricted sense of designating a particular representative as claimed by counsel.

The argument of counsel that the possession and cultivation prior to 1803 upon which confirmation was recommended by Recorder Bates referred to the tract subsequently included in survey No. 3309, is ingenious and able; but it falls powerless before the fact that the said confirmation has been adjudged by subsequent executive and judicial proceedings to refer to the tract included in survey No. 1583.

Whatever of doubt might exist upon the Recorder's report would seem to have been settled by the testimony adduced in these proceedings in settlement of the relation of such possession and cultivation to said survey No. 1583.

The confirmation to Joseph Calve's representatives was of the tract which Calve had cultivated and possessed prior to December 20, 1803. It was to be thereafter identified and located by a survey. To that end surveys were made of two different tracts and it was for the surveyor-general to determine which of the two located Calve's cultivation and possession, and to evidence his adjudication by his approval of the plat and by transmission of the certified copy thereof to the Recorder of Land Titles for his issuance and delivery of the requisite evidences of title. He very properly took testimony upon the question of possession and improvement, and thereupon determined that survey No. 1583 was the proper location of the confirmed tract, and accordingly approved it. Such approval of survey No. 1583 was virtually a disapproval of survey No. 3309.

The title to the land covered by survey No. 3309, which was thus virtually disapproved (and which I am urged at this late day to approve), has passed out of the United States by patent, and is no longer within executive control.

Counsel urge with great energy that the Mainville heirs are not concluded by the various executive and judicial decisions connected with the several surveys and the claims of right thereunder. Whatever of truth there may be in this contention, it still remains true that these decisions, especially the executive ones, are final *as to this Department*, and are conclusive against the further exercise of *its* jurisdiction over the subject-matter. And if they are not binding upon the Mainville heirs, these latter must assert their rights before some other tribunal whose jurisdiction has not been exhausted.

Fifty years have elapsed since the approval of survey No. 1583, and counsel now ask me to re-establish their claim of right under their rejected survey No. 3309 by an adjudication of my own, designed (if it

can have any effect) to give them a status which they do not now possess, and which has been uniformly denied to them by this Department whenever it has in any form been called upon to exercise its authority over any part of the subject of these two surveys. Whilst I would be willing to grant their request, so far as to give them such a status as to enable them to adjudicate their rights in the courts, yet to do so I shall find it necessary to set aside and annul the approval of survey No. 1583 by the surveyor-general on May 15, 1845; to ignore the issuance and delivery of patent certificate on survey No. 1583, which, by the act of June 6, 1874, is made the equivalent of a patent; to assume the authority to reverse the executive action which resulted on June 10, 1862, finally in the issue of patent to Mary McRee, on survey No. 2498, which included the tract covered by the previously rejected survey No. 3309; to disregard and contravene the decision of the Missouri Court of Appeals, in *Page v. Scheibel* (11 Mo., 167), and that of the same court in *Gibson v. Chouteau* (17 Mo., 1); and to reverse the decision of the Commissioner of the General Land Office Drummond, of April 18, 1874, denying an application by the Mainville heirs for the approval of the survey No. 3309, from which decision no appeal was taken, and to which no exception was filed, and pronounced to be final by a decision of July 30, 1883, by Commissioner McFarland, which was affirmed by a decision of the Secretary of the Interior of November 7, 1884, and reaffirmed by the decision of Acting Secretary Muldrow of September 15, 1886. The showing made is not sufficient in my opinion to justify me in reversing this long line of adjudication. I must decline to do so. The decision rendered by Acting Secretary Muldrow September 15, 1886, is hereby approved and adopted.

PRIVATE CLAIM—RIPARIAN GRANT—SURVEY.

STATE OF LOUISIANA *v.* JOHN McDONOGH & CO., ET AL.

In the survey of riparian grants in Louisiana the direction of the side lines is determined by the form and general course of the water front. If the front is a straight line the side lines will be parallel, if it is a curved line, the side lines will be either divergent or convergent.

The grant was of such depth "as shall be found unto Lake Maurepas," or "as far back as Lake Maurepas," but as said lake was not found within the side lines of said grant, it is held that it did not constitute a boundary, but was named as a point to designate the depth of the grant, and that such depth will be correctly shown by a line drawn through the center of the grant, from the front to the rear, terminating at the point of intersection with a line drawn at right angles thereto and touching the lowest point of the southern shore of the lake.

The State is not estopped from questioning the extent of the grant, by a suit in assertion of its right as the proper representative of the interest McDonogh attempted to bequeath to the city of New Orleans.

Secretary Lamar to Acting Commissioner Stockslager, January 6, 1888.

This case comes before the Department upon the appeal of the State of Louisiana, from the decision of the Assistant Commissioner of the

General Land Office, of May 17, 1887, involving the proper location and survey of the private land claims of John McDonogh and Company, and Henry Fontenot, Eastern district, New Orleans, Louisiana.

In 1882, so much of a subdivision survey of T. 10 S., R. 5 E., southeastern district (east of river), as lies south of the line of the old claimed limits of the William Conway portion of the Houmas grant, and east of the claimed line of John McDonogh and Company, as surveyed by deputy surveyor John Kap, was ordered to be canceled upon the ground that it was within the limits of the private land claim of John McDonogh and Company, which was confirmed by the act of Congress approved May 11, 1820.

Your predecessor thereupon canceled certain swamp land selections lying within said limits, from which action the State appealed.

Considering this appeal, my predecessor, on November 21, 1883 (2 L. D., 646) affirmed the action of your office, cancelling said selections solely upon the ground that no selections of lands within said claimed limits should be allowed until the question of the boundaries and extent of the grant had been the subject of adjudication by the Department.

The question as to the boundaries, or extent of the grant was not considered by Secretary Teller in said decision, but on the contrary he said :

I am advised that there has never been a survey of the McDonogh claim as an entirety by the United States surveyor general, and until that is done, or the question of the boundaries of the grant presented in some other proper manner, it seems to me it cannot properly be considered by this Department. . . . I am not, however, prepared to say that I acquiesce in the opinion which you seem to express in your letter of January 15, 1883, to the effect that the *tracts in question* were confirmed to McDonogh and Co. as part of their claim under the act of May 11, 1820. That depends upon the extent of the grant. I do not undertake now to decide whether the grant, as described in the claim presented to the register and receiver (greatly extending the depth beyond that as presented to the old board), considered in connection with the report and the act of May 11, was confirmed or acknowledged, so that no 'claim on the part of the United States' can be made against it to the whole extent of a 'depth extending as far as Lake Maurepas.'

Subsequently the surveyor general of Louisiana was instructed to order an investigation to determine the true and lawful mode for completing the surveys of said claims, and of fixing their limits and quantities so as to enable the surveyor general to finally locate and survey said claims according to law.

Upon said investigation, the surveyor general, assuming that the Secretary of the Interior, by his decision of November 21, 1883, had recognized the Fontenot claim as technically confirmed with depth to Lake Maurepas by the act of February 28, 1823 (3 Stat., 727), and that the claim of McDonogh and Company was at least recognized, if not technically confirmed, by the act of May 11, 1820 (3 Stat., 573), decided that it was unnecessary to pass upon issues already clearly settled by the

Secretary of the Interior, and held that the only questions remaining for his consideration were—

1. Shall the survey of the claim of Fontenot, preserving its front on the Mississippi river as section 44 in T. 11 S., R. 5 E., (see Doc. 62 of the record) be completed by the extension of its side lines to the lake in the courses heretofore given them by the existing surveys—or shall those side lines be extended as *parallel* lines?

2. Shall the survey of the claim of McDonogh, preserving in like manner its present front on the river as Secs. 41, 42, and 43 of T. 11 S., R. 5 E., be completed by the extension of its side lines to the lake and Amite river in the courses heretofore given them by existing surveys, or shall its side lines also be extended as parallel lines and to what depth?

The surveyor general in his opinion says, that the surveys above referred to were made under the rule that has obtained in the survey of riparian grants in Louisiana, to wit: that of divergency or convergency of the side lines at right angles to the general course of the bank from their points of departure; that "convergency, divergency or parallelism of side lines, resulted from the application of this rule to the particular parts of the water front. If that were a straight line, for any considerable distance, parallelism resulted. If it were at the outside or convex side of a bend, divergency resulted, as in the grant to Dupard at the bend of the river. If at a point on the concave side of the river, then convergency resulted."

Adhering to this rule, the surveyor general rejected the theory of parallelism with respect to the course of the lines as contended for by the State, and decided that the survey of the McDonough and Fontenot claims, should be completed according to the rule above set forth.

The report of said investigation, and the decision of the surveyor general therein, coming before your office for consideration, you say:

Upon the same basis of divergency the upper line of the McDonogh claim was extended by deputy surveyor John Kap to its intersection with the Amite river, in the year 1881, and your predecessor, after a careful examination of all the facts connected with the case, and an able report thereupon, concludes that the lower lines of McDonogh and Fontenot should be continued from the south side of Blind river in Township 9 S., R. 6 E., to the Lake and Amite river, and there connect with the traverse of those water boundaries, thus finishing the field work necessary to the proper location of the claim.

After a careful investigation of the case, I find nothing which would justify a different conclusion; and, if this decision becomes final, you will proceed to execute the survey as directed.

From this decision the State appealed, upon the following grounds:

The Commissioner erred in finding that John McDonogh & Co. had a complete claim under Pierre Delille Dupard to the whole amount now claimed, extending back in diverging lines to the Amite river.

The Commissioner failed to consider the newly discovered evidence found in his office showing the survey of two of the heirs of Dupard to John McDonogh, Jr., restricting the grant to eighty arpens in depth.

The Commissioner erred in holding that the description giving the boundary of the claim as Lake Maurepas meant the Amite river.

The Commissioner erred in finding that at an early date Dupard or his heirs claimed even to Lake Maurepas.

No question seems to be raised by the appeal of the State as to the correctness of your decision, holding that the survey should be made according to the rule of divergency of side lines at right angles from the general course of the river, so far as it affects the survey of the claim, to the depth of eighty arpens, although it is contended by counsel for the State in their argument that the grant being for a certain front and depth, and it not being specified that the lines are to open and close in any manner, it must be located by parallel lines.

In support of this rule they rely upon the decision of the supreme court of Louisiana in *Millaudon v McDonogh*, (18 La., 103) which held that "the grantee or purchaser cannot claim by diverging lines to the rear, and thereby obtain more than the superficies contained in a parallelogram, unless there be something in the grant to authorize the opening, or, from the peculiar position of the claim it shall be necessary to give the superficial quantity".

This case was taken to the supreme court of the United States by writ of error, and dismissed by that court upon the ground that it had no jurisdiction in the case, and hence the court did not pretend to pass upon the question as to the proper manner of locating the side lines of this grant. (3 How. 693.)

The decision of the supreme court of Louisiana in the case of *Millaudon v. McDonogh*, is not binding upon the Department as to the proper location of this grant, nor has the Department ever recognized, as authority, the ruling therein made.

As early as 1830, ten years prior to the decision above referred to, Deputy Surveyors A. H. Foster and Thomas P. Evans, in the survey of T. 11 S., R. 5 E., and T. 10 S., R. 5 E., respectively located the front and side lines of this grant to the extent of ten or twelve miles in depth recognizing the divergency of the side lines substantially contended for.

Surveys of townships, being partly within the claimed limits of this grant, were made from time to time after said decision was rendered, relocating and extending these lines in all of which the principle of divergency was recognized, and acted upon.

The supreme court in the case of the United States *v. McMasters* (4 Wall., 682), speaking of the Bachemin grant said:

That grant fronted on a bend of the river, on the convex side or shore, and according to the usage in Spanish locations on such bends, and which is the usage and practice of locations under our system of survey, the side lines were at right angles with the bend of the river, and as in the instance before us, diverge and widen as the lines extend for the entire depth of the front lot.

This rule was also recognized by the supreme court in the case of *Slidell v. Grandjean* (111 U. S., 412).

Concurring in your opinion that the front and side lines of this grant have been properly located as shown by the official plats of survey on file upon the basis of divergency recognized by the surveyor generals for more than half a century, the only questions remaining is, to what depth shall these lines be extended.

The cities of Baltimore and New Orleans claim, under the will of McDonogh, whose title is derived from a French grant made April 3, 1769, to Delille Dupard, of a tract of land having "30 arpens of front to the river, upon the whole depth which shall be found unto Lake Maurepas".

The front of the grant was increased to forty arpens which is accounted for by the action of the river increasing the arc of the bank.

About the year 1784 a partition was made of this land between the heirs of Dupard, five in number.

At the date of the acquisition of Louisiana by the United States the several interests in this grant were owned by the following persons, respectively and in the order named, counting from the upper part down the stream.

1. Antoine Tregre, four arpens front.
2. L. H. Guerlain, agent for the Eastern Shore of Maryland, Louisiana Company—ten arpens seven toises front.
3. John McDonogh, Jr., and Shepard Brown, partners, who purchased from Pedro Le Bourgeois, eighteen arpens, three toises and three feet.
4. Henry Fontenot,—eight arpens, four toises and three feet.

Each of these claimants, except Fontenot presented, his claim to the old Board of Commissioners, claiming the following depths respectively.

Tregre claimed "40 *arpens in depth*". Guerlain, "a depth *extending back to Lake Maurepas*", and McDonogh and Brown eighty arpens in depth, with side lines opening toward the rear.

The Board confirmed the claims as follows:

1. To Antoine Tregre, four by forty arpens, the full amount claimed.
2. To L. H. Guerlain, ten arpens, seven toises by forty arpens, rejecting the claim for a depth to the lake.
3. To John McDonogh, Jr., and Shepard Brown, sixteen arpens, eight toises and three feet by eighty arpens, and one arpen, twenty-five feet front by forty arpens.

Subsequently McDonogh and Co. became the owners of the whole of the Dupard grant, except the eight arpens, four toises and three feet owned by Fontenot, and under the act of February 27, 1813, they filed their claim before the register and receiver at New Orleans, with additional evidence, claiming a front of 32 arpens "with a depth extending as far as Lake Maurepas".

The register and receiver acting upon this claim reported it to the Senate January 20, 1817, as follows:

First class—species the first.

John McDonogh, Jr., & Co., claim a tract of land situated in the county of Acadia, on the east shore of the Mississippi, sixteen leagues

above New Orleans, containing thirty-two arpens front, with a depth extending as far as Lake Maurepas. This tract of land has formerly been claimed before the Board of Commissioners, and the depth extending beyond forty acres rejected by them for want of evidence of title; but the claimant has since produced a complete French title for the whole quantity claimed, in favor of Delille Dupard (under whom he claims), dated the 3d of April, 1769. (American State Papers, Duff Green Ed., vol. 3, 223).

The register and receiver reported this claim as belonging to the first species of the first class which are—

Claims founded on complete titles granted by the French or Spanish governments.

And added:

Those claims which are found under species first of the first class, being founded on complete grants of former governments, we think are good in themselves on general principles, and therefore require no confirmation by the government of the United States to give them validity.

By section first of the act of Congress of May 11, 1820 it was enacted:

That the claims for lands within the eastern district of the State of Louisiana, described by the register and receiver of the said district, in their report to the Commissioner of the General Land Office, bearing date the 20th day of November 1816, and recommended in the said report for confirmation, be, and the same are hereby, confirmed against any claim on the part of the United States.

With their last application McDonogh & Co., filed a plat of the survey of said claim made by F. B. Potier, a United States surveyor, which gives the boundaries of the claim substantially the same as now claimed by appellees, to wit; by diverging lines extending to the Amite River.

It is claimed by appellees that this plat was presented for the action of the Commissioners in support of their claim, and that as the claim was confirmed, it must necessarily be to the extent described in the plat.

There is no evidence that this survey was made under any authority from the government or approved by the surveyor general, or made under the legal sanction of any one authorized to act in the premises. Nor does it appear that the register and receiver, or Congress, acted upon this survey in recognizing this claim as a claim founded on a complete title needing no confirmation. As said by the supreme court in the case of *Millaudon v. McDonogh*:

There can be no doubt such plans and descriptions were filed and recorded in due time, but no evidence is found in the record that the register and receiver acted on them, or that they were presented to Congress even as documents accompanying the report; if they were, it is manifest that they were disregarded, for two reasons; first, because Congress did not assume the power to deal directly with this title at all; and, secondly, because the report had reference singly to the face of the grant, regardless of private surveys made subsequent to its date, at the instance of the successive owners.

By the act of May 11, 1820, Congress acknowledged and recognized the grants which the register and receiver reported and declared to be founded on complete titles, to be valid and complete against the United

States and any one claiming under them. But, as said by the supreme court in the case of *Millaudon v. McDonogh* (*supra*) "the recognition extended only to the boundaries the grants themselves furnished, according to their land marks, and true construction of the local laws."

The extent of the claim of McDonogh must therefore be determined by the extent of the grant to Dupard and should not be limited by the depth confirmed to McDonogh under his first application, claiming under the grant to Le Bourgeois, or of the depths confirmed to the kindred claims, of which McDonogh subsequently became owner. The admission of the several claimants in their petition for confirmation, as to the depth and extent of their claims, does not conclude the heirs of McDonogh from showing depth to a greater extent under the act of May 11, 1820, recognizing a complete and valid title in McDonogh & Co., to all the land granted to Dupard by the French grant of April 3, 1769.

The grant to Dupard is for "30 arpens of front to the river, upon the whole depth which shall be found unto Lake Maurepas, where heretofore were two villages of the Collapissa savages."

The claim of McDonogh & Co., as presented in their second application before the register and receiver, was for "a depth extending as far as Lake Maurepas".

Presuming that the side lines of the grant have been correctly located with reference to their degree of divergency, it is then certain that no part of the McDonogh claim will touch Lake Maurepas, and it is uncertain whether the lower line of the Fontenot claim, which is the lower line of the Dupard grant will touch any part of the lake, but if it touches the lake at all it will be at a point on the western shore of the lake near the Amite River.

The lower line of the grant run by Potier, as projected on the corrected plats in the surveyor general's office, does not touch the lake at any point, and the maps furnished by the surveyor in response to the letter of the Commissioner of the General Land Office of July 27, 1866, show that the lower line of the Fontenot claim projected by calculation and protraction to pass along the western shore of the lake near the mouth of the Amite River, and that no part of the lake is in the rear of any part of the grant, but to the east of it.

The decision of your office assumes that at the date of the grant the lake extended along the rear of the grant, and that it has receded or been filled in by crevasse deposits, until the lake is now to the east and on the lower boundary line of the grant. Upon this theory you hold that the lines should be extended over all the land thus formed by the receding of the lake—from its eastern boundary, and direct that the lower lines of the Fontenot & McDonogh claims should be extended to the Amite River.

While this theory may possibly be correct, I do not think there is sufficient evidence in the record to warrant the conclusion. It is purely

speculative, and as the call for a depth as far back as the lake may be made certain without resorting to it, I am not inclined to adopt it.

Lake Maurepas was not named as a boundary of the grant, but simply as a point to measure the depth of the grant, and hence the land formed by accretion does not inure to the claimants under the grant. The grant did not pretend to convey to claimants in terms, all the lands bordering on Lake Maurepas within the side boundaries, but only to grant thirty arpens front on the river, and of such a depth as may be found unto Lake Maurepas.

The boundary of the lake might be of different depths from the front: as, for instance, it might be of a certain distance from the front in the centre of the grant, and double that distance from the front at the sides of the grant. If Lake Maurepas had been named as boundary of the grant it would have conveyed all the land along the shore of the lake within the limits of the grant and with it the riparian rights. But a grant of thirty arpens front with such depth "as shall be found unto Lake Maurepas" or "as far back as Lake Maurepas" would convey only such depth as may be found to the nearest point of the lake. Therefore the distance on a straight line through the center to a point corresponding with the nearest point of the lake would be the measure of the depth of the grant.

It is contended by counsel for the State that, as the call for the lake cannot be reached by extending the lines of the survey, rendering the identity of the grant uncertain, the grant is therefore void. I do not think the grant is uncertain by reason of the fact that the lake cannot be found in rear of the grant because, as before stated, the lake is not named as boundary of the grant, but merely a point to designate the depth of the grant.

If the side lines of the grant are correctly located, and the western and southern shores of the lake are the same as they were when the grant was made, it shows that while Lake Maurepas is not immediately in rear of the grant it nearly adjoins one side of it and is in the direction of the rear. Lake Maurepas is situate north of the river while the grant runs from the river to the north in the general direction towards Lake Maurepas.

While a line drawn through the grant from the front to the rear might not touch the lake, yet, "the whole depth that shall be found unto Lake Maurepas" or a depth "as far as Lake Maurepas" can be ascertained by finding the corresponding depth; that is, a depth equal to or corresponding with the depth of Lake Maurepas from the river, and therefore the call for such depth may be made certain.

The depth of these grants is determined by a straight line drawn through the centre from the front to the rear, and by this rule a depth "as far as Lake Maurepas" can be ascertained.

In this case a line drawn through the centre of the grant from the front to the rear, terminating at the point of intersection of a line

drawn at right angles thereto, so as to touch the lowest point of the southern shore of the lake, would seem to determine accurately a depth "as far back as Lake Maurepas." It seems to me that this is the only rule by which the depth of this grant can be ascertained in accordance with the terms of the grant, I am therefore of opinion that the depth of this grant only extends as far back as the southern shore of Lake Maurepas, and that the side lines of the grant should not be extended farther than that depth.

It is urged by counsel for appellees, that the State is estopped from now claiming title to these lands, because it was a party to a suit against the executors of John McDonogh, claiming these identical lands under the will of McDonogh.

By the will of McDonogh it was provided that if there should be a lapse of both the legacies to the cities of Baltimore and New Orleans, or either of them, wholly or in part, by refusal to accept or from any other cause, then "said legacies shall inure, as far as relates to the city of New Orleans to the State of Louisiana, and as far as relates to the city of Baltimore to the State of Maryland".

The State of Louisiana and Maryland brought suit to declare these bequests void, and to declare the conditional bequests of the same property, to them as then valid and in force.

In this suit the States of Maryland and Louisiana merely claimed to be the proper representatives of whatever interests McDonogh attempted to bequeath to the cities of Baltimore and New Orleans. The question as to the title to this land, or as to the extent of the claim of McDonogh under the grant to Dupard was not in issue, and had not been determined. I do not think that the State is estopped by that suit from denying that the grant to Dupard extended to the Amite River, and the authorities cited do not sustain the position contended for by counsel.

Your decision is reversed and you will direct that the survey of these public lands be closed upon this grant in accordance with the rule above stated.

RAILROAD GRANT—SUIT TO RECOVER TITLE—ACT OF MARCH 3, 1887.

SIoux CITY & ST. PAUL R. R. Co.

Suit requested for the recovery of title, the company having failed, after due demand, to reconvey the lands found to have improperly patented for its benefit.

Acting Secretary Muldrow to the Attorney General, January 11, 1888.

In January, 1887, an application was filed in this Department in behalf of certain settlers in O'Brien County, Iowa, asking that suit be commenced and prosecuted in the name of the United States to assert title to about 55,297.21 acres of land in O'Brien County, claimed by the

Sioux City and St. Paul Railway Company, and the Chicago, Milwaukee and St. Paul railway Company, respectively, under and by virtue of the grant to the State of Iowa by act of Congress, approved May 12, 1864 (13 Stat., 72).

Applicants aver that neither of the companies mentioned has earned the lands in question, nor any of them; that they, the said applicants, are settlers upon said lands, and that they are seeking to acquire title to the same under the settlement laws of the United States.

Said application was considered and acted upon by this Department July 26, 1887 (6 L. D., 54), after full argument orally and by briefs filed in behalf of the applicants and the railroad companies respectively.

In that decision the conclusion was reached that in so far as the application had reference to the Chicago, Milwaukee and St. Paul Railway Company there is no good ground for requesting the institution of suit as asked.

With reference to the Sioux City and St. Paul Railroad Company, however, it was decided that more land had been patented to the State of Iowa for the benefit of the company than it is entitled to under the grant by act of Congress approved May 12, 1864 (13 Stat., 72).

The Commissioner of the General Land Office was directed to complete the adjustment of the grant in accordance with the views expressed in said departmental decision, and to make demand in compliance with section two of the act of March 3, 1887 (24 Stat., 556), upon the Sioux City and St. Paul Railroad Company, and upon the State of Iowa for the relinquishment and reconveyance to the United States of the excess found by the adjustment to be wrongly held under patents from the United States. The Commissioner was further directed to make report to this Department whether the company and State did or did not relinquish and reconvey, with a view, in case of neglect or failure to so reconvey, of requesting you to institute suit for the recovery of the lands wrongly held. That report dated January 7, 1888, has been made and is now before me. It sets out that the adjustment shows 21,692.18 acres of unearned lands held by the State under patents from the United States for the benefit of the Sioux City Company, and 788.13 acres which have been by the State passed to the company in excess of the amount earned; also that there has been a failure on the part of the company and of the State to reconvey as requested.

With said report are submitted copies of letters from the General Land Office to the Governor of Iowa, and to the President of the railroad company, together with such replies as were made to said letters.

The Acting Commissioner who makes the report has also returned therewith the entire record in the case as it was before the Department when the decision of July 26, 1887, was rendered.

I have now the honor to forward to you said report together with accompanying papers and exhibits, and to request that suit be instituted in the proper court in the name of the United States, with a

view to having title to the lands referred to herein and in departmental decision of July 26, 1887, as unearned by the Sioux City and St. Paul Railroad Company declared in the United States, if after examination and consideration you deem such suit advisable.

Reference is made to said departmental decision of July 26, 1887, (a printed copy of which is herewith, marked A,) for a fuller recital of facts and for the reasons in detail upon which this request is based.

CONTEST—DEATH OF CONTESTEE—BURDEN OF PROOF.

TIBERGHEIM *v.* SPELLNER.

In contest proceedings the death of the entryman, after appeal by him from an adverse decision of the local office, does not abate the contest.

The burden of satisfactorily showing that the claimant has not complied with the law rests upon the contestant, but a clear preponderance of the evidence is all that is required to warrant a judgment of cancellation.

The cases of *Ewing v. Rickard* and *Cornell v. Chilton* overruled.

Acting Secretary Muldrow to Acting Commissioner Stockslager, January 11, 1888.

I have considered the case of James M. Tiberghem *v.* Frederick Spellner (now deceased) appealed from the decision of your office, dated December 14, 1885, holding for cancellation said Spellner's homestead entry, on the SW.¼ of Sec. 8, T. 2 N., R. 13 E., Stockton, California.

Spellner made entry April 10, 1884; contest was initiated October 22, 1884, and a hearing had therein December 17th following, which resulted in a decision by the register and receiver that said entry should be canceled. On February 17, 1885, Spellner appealed, and it appears, died on the 6th day of March following. William Spellner, who claims to be decedent's father and sole heir, entered his appearance on appeal, and moved to dismiss the contest on the ground that it abates by the death of said Frederick.

The errors assigned are, substantially: First, Your failure to sustain this motion. Second, In finding the evidence submitted by the contestant sufficient to warrant the cancellation of the entry.

In support of the first assignment of error, it is contended that to deprive appellant of his equitable title to the land in controversy, without first giving him an opportunity to be personally heard before the local officers in the original proceeding, is to deprive him of property arbitrarily and without due process of law.

And in support of the second, it is contended, that in a proceeding involving the forfeiture of the entryman's property the same strictness of proof is required as in criminal cases; that a mere preponderance of the evidence is not sufficient, and that before the entry can be rightfully

canceled, a failure by the entrymen to comply with the law, must be affirmatively shown beyond a reasonable doubt. In support of the latter position counsel cites, *Ewing v. Rickard*, (1 L. D., 146) *Cornell v. Chilton*, (ib., 153) *Ballard v. McKinney* (ib., 477).

Over-ruling the motion to dismiss the contest was not error. In contest proceedings instituted for the purpose of procuring the cancellation of a homestead entry, the death of the entryman, after an appeal taken by him from the decision of the local land officers holding his entry for cancellation, does not abate the contest. The determination of the matter by you, on the record in the case, was in conformity to the settled practice of this Department. (*Cummins v. Burt* 3 L. D., 544).

Nor is this a mere arbitrary exercise of executive power, as argued by appellant's counsel.

It cannot be perceived that any purpose of justice would be subserved by the abatement of the contest proceedings in this case, and no legal principle is violated by holding that the death of the contestee does not abate the contest. The death of a party to a suit does not abate the action in the State of California where the land in dispute is situated: (see section 385 Code of Civil Procedure) nor, an appeal, in the supreme court of the United States. (See Rule 15, United States supreme court).

This brings me to the consideration of the second assignment of error, to wit, that the evidence is insufficient to warrant the cancellation of the entry. The material allegation in this case is, "that said tract is not settled upon and cultivated as required by law." The evidence tending to prove this allegation is somewhat meager and is chiefly of a negative character. The contestant testifies that he lives about four miles from the land in controversy; that he was on it six or eight times between April 10 and October 20, 1884; that he never saw claimant on the land, and that there was during that period no house on the land; that at the latter date there was some lumber there, five or six acres cleared and had been for several years, and that some of this land was plowed; that hay was cut on the land in May or June, and that claimant might have cleared a small portion of the land; that claimant had a house partially built on the land November 9, 1884, but was not living in it, and that the only place he knew of his living was with his (claimant's) father near Angels. William and Thomas Blair, who live two miles from the land, each testify that they were on the land twice during the above-named period, and that the claimant did not during that period live on the land. This constitutes substantially the testimony on the part of the contestant in support of his allegations.

The testimony on the part of claimant shows that he was seen a number of times on the land at work; that some clearing and burning of brush had been done by him; that he had caused about five acres of the land to be broken, and that on October 10, 1884, he had some building lumber hauled and put upon the land where he afterwards, and after the institution of the contest, built a house. Neither he, nor any

of his witnesses testify to his having ever established a residence on the land, and it is contended that he was not called upon to do so, as the evidence tending to show that he had not done so is insufficient to establish that fact. The burthen of satisfactorily showing that the claimant has not settled upon the land as required by law is unquestionably on the contestant, and the claimant was not called upon to introduce any testimony whatever until this was done, but a *prima facie* case is made out against him by the testimony introduced by the contestant. The case may not be so strong as would be required to secure a conviction in a criminal case, nor is it required to be. A clear preponderance of the evidence is all that is required in cases of this kind, and that I think is found here.

The third case cited by counsel for appellant is not in conflict with this opinion. The case of *Ewing v. Rickard* (1 L. D., 146) and of *Cornell v. Chilton* (ib., 153), are hereby overruled in so far as they conflict herewith, and your decision holding the said entry for cancellation is affirmed.

RAILROAD GRANT—SETTLEMENT CLAIM—ALIEN.

CENTRAL PAC. R. R. CO. *v.* PAINTER.

The status of land excepted from a railroad grant by reason of a settlement claim at date of definite location, is not affected, so far as the company is concerned, by the subsequent abandonment of such claim.

No rights are acquired by the settlement of an alien, but such settlement becomes valid from the date of filing declaration of intention to become a citizen.

Acting Secretary Muldrow to Acting Commissioner Stockslager, January 12, 1888.

I have considered the case of the Central Pacific Railroad Company *v.* Thomas Painter, as presented by the appeal of said company from the decision of your office, dated March 31, 1886, rejecting the claim of said company to the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of Sec. 29, T. 7 N., R. 1 W., Salt Lake City land district, Utah Territory, and allowing Painter's pre-emption declaratory statement No. 543 for said tracts to remain intact.

The record shows that said land is within the limits of the grant to the Central Pacific Railroad Company, by acts of Congress approved July 1, 1862 and July 2, 1864 (12 Stat., 489; 13 Stat., 356).

On May 18, 1869 Painter filed said declaratory statement for said tracts, alleging settlement on May 1st, 1867. Upon the application of said company to select said land, Painter was notified to appear and show cause why the land should not be patented to said company under the provisions of said grant.

A hearing was duly had before the local officers on February 4, 1885.

The decision of the local land office was in favor of the company.

Your office, however, on appeal reversed the decision of the local land officers, and held that the evidence submitted showed that Painter settled on said land in 1867, and continued to reside thereon, with his family, until his death in May, 1882; that he made valuable improvements on the land; that after the lands were surveyed it was discovered that Elijah Shaw, W. E. Johnson and said Painter were all residing on the NW. $\frac{1}{4}$ of said section prior to and on October 20, 1868; that Mr. Shaw had an orchard on the land and had done some grubbing, plowing and fencing thereon; that Shaw's house was on the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section, but his improvements extended on to the land in question; that upon the settlement of the claims of said settlers, it was agreed that Johnson should have the SW. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of said section, Painter the land in controversy and that Shaw should take a tract in Sec. 32; that from the testimony of Shaw, it appears that he abandoned the land in question upon the belief that Painter had the prior right to the same, and that he would give Shaw his improvements, when he obtained title to said land; that it was formerly held that the right of the company attached to lands in the locality of these lands on October 20 1868, but that your office on September 16, 1895, held that the company's right attached April 28, 1869, and that the question of the true date of the definite location of said road was pending before this Department on appeal.

Your office further decided that the principal defense of the company was, that said Painter was an alien and did not file his declaration of intention to become a citizen of the United States until May 14, 1869; that in the case at bar, it was immaterial which of the two dates (*supra*) be finally accepted as the date of the definite location of the road, for the reason that at the first date, both Painter and Shaw were occupying said tracts, with the intention of entering the same under the settlement laws, and that at the second date, Painter was still residing on the land with his family, and so continued until his death in 1882; that, therefore, by reason of said settlement claims, the land covered thereby must be held to have been excepted from said grant. I concur with the conclusion of your office that the claim of said company must be rejected for the reason that this Department has held (5 L. D., 661) upon a full consideration of the whole question, that "the line of the Central Pacific was definitely located opposite the lands in question October 20, 1868", and at that date the lands in question were covered by the settlement claim of Shaw. Painter could acquire no right prior to the filing of his declaration of intention to become a citizen of the United States. This has been the well settled ruling of this Department (See Southern Pac. R. R. Co. v. Saunders and cases cited 6 L. D., 98). But the settlement claim of Shaw served to except the land covered thereby from the railroad grant, and the fact that after the definite location of the road Shaw abandoned said NW. $\frac{1}{4}$ and made entry of another tract, can not affect the status of the land so far as relates to the claim

of the company. *Ramage v. Central Pac. R. R. Co.* (5 L. D., 274); *Brown v. Central Pac. R. R. Co.* (6 L. D., 151); *Union Pacific R. R. Co. v. Simmons* (ibid 172).

The subsequent filing of the declaration of intention by Painter, on May 14, 1869, from that date validated his settlement and the land then being free public land, there can be no good reason why said filing should not remain intact and final proof be allowed to be made by the proper party or parties for the benefit of the heirs of said pre-emptor.

The decision of your office is accordingly affirmed.

PRIVATE CLAIM—SCRIP; RES JUDICATA.

MADAM BERTRAND.

In the issuance of scrip under the act of June 2, 1858, the material questions are:

(1) Has the claim been confirmed? (2) If so confirmed does it for any reasons other than the discovery of fraud after confirmation, remain unlocated and unsatisfied, either in whole or in part?

A case is not *res judicata* where the ruling was in the nature of general instructions to cover all cases of its kind, and was not made in the case on appeal.

Acting Secretary Muldrow to Acting Commissioner Stockslager, January 14, 1888.

The private land claim of Madam Bertrand is entered as No. 23, second class, in the report, dated December 30, 1815, of the register and receiver, acting as commissioners for the Western District of Louisiana (Am. State Papers, Green's Ed., Vol. 3, pp. 153, 154.)

This report is in the words following, to wit:

Madam Bertrand claims 800 superficial arpens of land, viz: 20 arpens front by 40 in depth, situated on the Bayou Plaquemine Brule, in the county of Opelousas, bounded on one side by Bertrand Tailleur, and on the other by vacant, held under an order of survey in favor of claimant, dated the 19th May, 1787, and signed by Estevan Miro, then governor of Louisiana. The order of survey accompanies the notice. The evidence of Chevalier Villier, taken the 12th August, 1813, established the land to have been inhabited and cultivated for thirty consecutive years previous to the taking of his testimony.

In connection therewith the Commissioners say:

Class 2 (the class which includes this claim) will comprise claims founded on authentic orders of survey, conceded by the Spanish government of Louisiana, which, with or without proof of occupancy, ought, in the opinion of the said register and receiver, to be confirmed. See note B, at the end of the report.

In said pote B, the Commissioners (among other things) say:

The register and receiver are of opinion that, in justice and equity, all claims founded on orders of survey ought to be confirmed, and especially those in the western district. The conditions on the performance of which the completion of the title depended, being inapplicable to the local circumstances and situation of the country, it is

believed were never insisted upon Even claims founded on orders of survey, without special locations, conceded, for example, for any vacant land in the post of Opelousas, are considered as valid. It is known that such concessions were sometimes made for the remuneration of persons from whom lands had been taken by the Spanish government for garrisons or other public uses. The property so taken from the claimant or his ancestor has, by the cession of Louisiana, become vested in the United States. Would it then be just to withhold the indemnity for which the former government had become pledged ? etc.

Acting upon this report and recommendation, Congress, by act approved February 5, 1825 (4 Stat., 81), confirmed the claim.

It appears that on the 23d of November, 1833, Surveyor-General H. B. Twist ordered a survey of this claim, but for some reason or other, possibly because the data for such survey were quite meager, and because the exact location of the claim was then unknown, such survey was never made, and so far as all records show the claim remains yet unlocated.

In 1872, the succession of Madam Bertrand was opened in the parish court for Lafayette Parish, Louisiana, and on the 29th of August of that year, pursuant to a decree of said court, this claim was sold to D. J. Wedge, in whose favor the sheriff of said parish issued the usual act of sale.

Wedge afterwards applied to the surveyor-general for certificates of location in satisfaction of this claim, under the act of June 2, 1858 (11 Stat., 294), and on the 14th of September, 1877, that officer issued such certificates two in number—marked “No. 377 A, 320 acres,” and “No. 377 B, 360.56 acres,” aggregating 680.56 acres (eight hundred arpens).

In his letter transmitting said certificates to the Commissioner of the General Land Office for his approval and authentication, the surveyor-general says:

A careful and complete examination of the records of this office including the field notes of public surveys, the township maps, the papers and memoranda and the abstracts relating to private land claims has satisfied me that this claim has never been located or otherwise satisfied in whole or in part.

I have examined the confirmation of the several private land claims situated on Bayou Plaquemine Brule, with a view of ascertaining if there was not another confirmation of this claim in the name of some other person. But I fail to discover any further facts than what have been already stated. I believe that the failure to survey this claim was on account of the vague and imprecise language of the confirmation.

(Evidently meaning the language of the Commissioner's report giving the location of the claim).

Many cases of this kind having come before the General Land Office for satisfaction under the general scrip act of 1858, the Commissioner, under date of April 25, 1879, referred this one as a test case to the Secretary of the Interior for instructions as to what disposition to make of them.

Under date of May 7, 1879, the Secretary replying to the said letter of the Commissioner of the General Land Office informed that officer that:

I am of opinion that the actual or approximate location of the boundaries of the claim should be established by satisfactory proof prior to the issuance of scrip as indemnity for the same. In no other way can the interests of the government be protected against the issuance of scrip a second time for the same land, in the name of another conferee, a proceeding not contemplated by the law-makers, or authorized by the act of 1858. (See Land Office Report for 1879, pp. 214, 215, 216).

Thereupon the Commissioner of the General Land Office suspended the scrip issued in this case, as well as that issued in others of like character, and it was not until the decision of the Department in the case of Stephen Sweayze April 8, 1887 (5 L. D., 570), that the aforesaid ruling of Secretary Schurz was in any degree modified. After the decision in the Sweayze case, the attorney for the present applicant requested the Commissioner of the General Land Office to authenticate the scrip which had been issued in this case, claiming that the two cases were similar in every respect; but that officer by letter addressed to said attorney, under date of July 2, 1887, refused to approve and authenticate said scrip, because the ruling of Secretary Schurz in this case had not been expressly overruled. Appeal from this decision brings the case here.

In the Sweayze case the general scrip act of 1858 was given a very thorough consideration in connection with an application for scrip in satisfaction of a claim in many respects identical with the case at bar. Both claims rest upon an order of survey, dated prior to the year 1800; neither ever had a specific location prior to confirmation, as contemplated by the act of 1858, for until there is a survey of the claim or an actual marking out of its boundaries, there is no specific location, *Stanford v. Taylor* (18 How., 409), *Ledoux et al. v. Black* (id., 473), *Willot et al. v. Sanford* (19 id., 79), *West v. Cochran* (17 id., 403), and authorities cited in the Sweayze case (*supra*); and both claims remained unlocated and unsatisfied at the date of the application for scrip. The only difference in the cases lies in the fact that in the Sweayze case there had never been any inhabitation and cultivation of the claim, while in this case the claim had been inhabited and cultivated for a period of nearly thirty years prior to the year 1813. I was inclined to think when the Sweayze case was decided that this difference just mentioned was material. But upon a further and more searching examination of the State papers and the law relative to claims of this character, I am convinced that there is no material distinction. The report of the Commissioners in claims of this character, quoted above, makes no distinction between a claim founded on an order of survey where there is inhabitation and cultivation and a claim in which those elements do not exist.

The material questions under the act of 1858 are :

(1) Has the claim been confirmed? and (2) If so confirmed, does it for any reason, other than the discovery of fraud in it after confirmation, remain unlocated and unsatisfied, either in whole or in part? That this claim has been confirmed there can be no doubt; that there has been no discovery of fraud in it after confirmation is equally free from doubt; and that it remains wholly unlocated and unsatisfied is also, to my mind, clearly shown. The report and finding of the surveyor-general upon this point is clear and unequivocal. All the land along the Bayou Plaquemine Brule has either been absorbed by other private claims, or has been surveyed as public land and disposed of under the general land laws, or is subject to such disposition. As shown by the authorities heretofore cited there can be no specific location of a claim of this character without a survey by the duly constituted authority. Had there been any such a survey of this claim, the records of the surveyor-general for Louisiana, as well as the records of your office, would show such fact. There has in truth been no survey of this claim, and consequently no specific location of it as contemplated by the act of 1858. Neither has it in any other manner been satisfied by the government. In no other way under the law could the claim be satisfied than by the issuance of scrip under the act of 1858, and that such scrip has not yet been approved and authenticated is equally certain, for the question of its approval is all that is involved in the case here.

I am now convinced that the ruling in the Sweayze case upon this question will govern in this one, that there is no material distinction between the cases, and that consequently they should receive equal treatment at the hands of the government.

As regards the succession proceedings, it is sufficient herein to say that this case is ruled by the decisions in the cases of Lettrieux Alrio (5 L. D., 158), and John Shafer (*id.*, 283). What was said in those cases with equal propriety applies to this case, and will not be repeated here. Under the law as enunciated in those cases the record herein shows D. J. Wedge to be the legal representative of the original confirmer, Madam Bertrand, and therefore entitled to receive the scrip in satisfaction of this claim.

It is hardly necessary to add that in no sense can this case be considered *res adjudicata* under the aforesaid ruling of Secretary Schurz. That ruling was only in the nature of general instructions to the Commissioner of the General Land Office, was to cover all cases of this kind, and was not made in the case on appeal; furthermore said ruling was merely an order of suspension until certain evidence should be furnished. Had the evidence required by that ruling been afterwards furnished, the Department at any time on its own motion might have taken up the case and adjudicated it upon its merits. The rule laid down in the Sweayze case (*supra*) obviates the necessity of furnishing this evidence,

and therefore the case stands open to adjudication under the law as now understood and interpreted.

The decision appealed from is reversed.

TIMBER CULTURE CONTEST—GROWTH OF TREES.

FROHNE v. SANBORN.

That the entryman has not secured the growth of trees required by law, will not in itself warrant cancellation on contest, if it appears that such failure is not due to the neglect of the entryman.

Acting Secretary Muldrow to Acting Commissioner Stockslager, January 16, 1888.

In the case of Augustus E. Frohne v. George H. Sanborn, appealed by the former from the decision of your office dated November 15, 1886, the following are the material facts:

On March 4, 1875, said Sanborn entered the NE. $\frac{1}{4}$ Sec. 4, T. 139, R. 49, Fargo, Dakota land district, under the timber culture law. January 9, 1878, he relinquished the south half of said tract and his entry was to that extent canceled. On April 14, 1885, said Frohne instituted a contest against the entry on the north half of said quarter section alleging in substance:

1st. That five acres of said tract had not been planted to tree seeds, seedlings or cuttings, and that no greater part thereof than two acres had been so planted.

2d. That for five years prior to the initiation of contest not to exceed two acres of the trees etc. had been cultivated, or protected, or were growing on said land.

A hearing was duly had on the issues presented and on December 4, 1885, the local officers decided that said allegations were not sustained by the evidence, and that the contest should be dismissed.

After the contestant had introduced his evidence in chief at the hearing and rested his case, the claimant moved to dismiss the contest on the ground that contestant had failed to prove his allegations. Whereupon the contestant asked leave to amend his complaint and moved that the case be continued to a time which would allow thirty days notice of same to be served on claimant. He also presented the proposed amended complaint which contains substantially the two allegations above set out, omitting, however, the allegation that not more than two acres had been planted and cultivated to trees, and alleges further, that thirty-three hundred and seventy-five trees were not growing on said tract as required by law, nor more than fifteen hundred. Each of these motions was overruled, and exceptions duly taken.

The evidence taken at the hearing shows that the required number of acres—within the time required by law—had been planted to tree

seeds etc., on this tract, and that the five acres so planted, and the trees growing thereon, had been more or less cultivated each year up to and including the year 1884; that there had been during this time numerous replantings of tree seeds, cuttings, and young trees—from the forests and nurseries—on the same five acres; that this particular five acre tract, or a large part of it, was illy adapted to the growth of young trees, being low and wet and of a sticky clay or “gumbo” soil; that in the wet season of the year it was frequently covered, or a large portion of it, with water, and that in the dry season it was hard and would open in cracks, and that its cultivation was confined to the months of May, June and July.

The showing of young trees on this land at the time contest was instituted is certainly very poor, the number alive and growing at that time being considerably less than the number required to be shown to be thrifty trees on making final proof—to wit, six hundred and seventy-five to each acre. In addition to this the average size of the trees is quite small, not being probably over four feet in height, and many not being over one foot high. It appears from the evidence that very few of the first planting escaped the hail storm of 1878, the winter freezing under water, and the annual summer sun baking since that time.

The local officers and your office seem to have excluded from consideration all testimony as to the number and size of the trees, and the unsuitableness of the ground selected for growing them, and have held the contestant to strict proof of the allegations of his original contest affidavit. Appellant insists that this testimony shows bad faith and that to exclude it from consideration is error; that the non-acceptance of his amended complaint—offered a second time and this time without asking a continuance—was also error; that the evidence shows negligence, and want of proper care and cultivation, and a non-compliance in good faith with the timber culture law on the part of the claimant, and that his entry should be canceled. These objections substantially embody all assignments of error.

Taking all the evidence presented into consideration, as fully as though the contestant had been permitted to amend his affidavit of contest, it does not appear that sufficient ground for cancellation of the entry has been shown. The character of the ground selected, the care and cultivation bestowed, and claimant's persistence in trying to grow trees on the same ground, and by the same mode of culture, after repeated partial failures, may show bad judgment, but do not establish bad faith. That seeds or trees for some cause not due to the neglect of the entryman, do not grow, has never been held a reason sufficient in itself to warrant cancellation. *Hartman v. Lea* (3 L. D., 584).

From a full examination of the case, I am led to the conclusion that the decision of your office should be, and it is accordingly hereby affirmed.

SCHOOL INDEMNITY SELECTION; ACT OF MARCH 3, 1883.

STATE OF ALABAMA.

By the provisions of the enabling act of March 2, 1819, and the act of admission, the State of Alabama was invested with the legal title to every sixteenth section, according to the surveys, irrespective of the character of the lands upon which they were located, and in case of previous sale, grant or disposal thereof, the right to indemnity existed in precisely the same character of land.

The legislation subsequent to the act of 1819, while resulting in a particular method for the disposition of mineral land, did not operate to repeal the said act or to abridge the right of the State to the sixteenth section or to select indemnity therefor.

Prior to the passage of the act of March 3, 1883, coal lands were open to entry and purchase at private sale the same as agricultural land, subject only to certain limitations as to price and quantity, and the provision in said act that "all lands which have been heretofore reported to the General Land Office as containing coal and iron shall be first offered at public sale", did not operate to reserve such lands from indemnity school selection until after public offering.

Secretary Lamar to Acting Commissioner Stockslager, January 5, 1888.

Application of the State of Alabama to select as school indemnity the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 28, T. 17 S., R. 1 W., in lieu of an aggregate deficiency of the same quantity in Sec. 16 &c., in said State.

The above application was forwarded to you for instructions by the register of the Land Office at Montgomery. On August 22, 1887, you rejected the application upon the ground that, though the basis of the selection was valid, the above tract is not subject to selection; that this tract was reported as coal land prior to March 3, 1883; that the act of Congress passed on that date provides that all lands theretofore reported to the General Land Office as containing coal and iron, should be first offered at public sale; and that the effect of this provision upon said land was to withdraw it from disposal until so offered. From this decision the State by her attorneys, appealed to this office.

The question presented for my consideration is whether these lands so reported as coal lands are open to selection by the State as indemnity lands in lieu of the sixteenth section originally granted to Alabama, or whether they have by subsequent legislation of Congress been placed beyond the operation of those acts of Congress under which the right of Alabama to select school lands arises. In support of the proposition that the lands in question are not subject to such selection, attention has been called to certain decisions involving questions arising under the laws of California. The *Mining Co. v. Consolidated Co.* (102 U. S., 167); *Mullen v. United States* (118 U. S., 271). It is urged that the language of the act admitting California into the Union granted to that State "Sections sixteen and thirty-six for the purpose of public schools in each township;" that this language was certainly broad enough to cover mineral as well as non-mineral lands; but the court nevertheless

in the former case reached the conclusion that said language was not intended to cover the mineral lands.

It is perfectly apparent that the language of the supreme court in that case is directed exclusively to a construction of the act of March 3, 1853, under which the right of California to the school land arises, and to a consideration of the policy therein settled by Congress with reference to the mineral lands of that State. In one of the sections of that act was a grant to the State of California of the sixteenth and thirty-sixth sections in each township for public school purposes. It was claimed by the State of California and those holding under it that the meaning of the grant was that the sixteenth and thirty-sixth sections would cover the mineral land and that the indemnity therefor would cover the same. The supreme court held that the mineral lands were by the express provisions of the act itself excepted from the effect of the grant as to the sixteenth and thirty-sixth sections, and that the State, under that construction could only take agricultural lands. To show this it entered upon a critical examination of the various sections of the act itself. After quoting many of the sections of the act at length, Judge Miller who delivered the opinion of the court says, "the main purpose of that act was to provide for the survey and sale of the public lands, and for the right of pre-emption to the settler on them, and there was embraced in this clause of pre-emption the grant of the sixteenth and thirty-sixth sections to the State for school purposes. In the very sentence which contains this grant, in parenthesis, and while introducing the new principle that the public lands should be the subject of the right of pre-emption whether surveyed or unsurveyed, the mineral lands are excepted in express terms from this right and from public sale." Again: "* * * * * and so careful was Congress to protect mineral lands from sale and pre-emption that, as we have already shown by the proviso to Section 3 of the act, the surveyors were forbidden to extend their surveys over them. The effect of this was, as Congress intended it should be, that, as no surveys could be made of mineral lands until further order of Congress, there could be no sale, pre-emption or other title acquired in mineral lands until Congress had provided by law for their disposition. The purpose of this provision was undoubtedly to reserve these lands, so much more valuable than other public lands, and the nature of which suggested a policy different from other lands in their disposal," etc.

Again: "It is a strong corroboration of this view that Congress in section 12 of this same statute, giving the State seventy-two sections for a seminary of learning declares that no mineral lands shall be taken under the grant."

Again: "It seems equally clear to us that *the land* is excepted from the grant meaning the grant of school lands by the terms of the 7th section of the act of 1853."

Quotations could be multiplied showing that the decision was based not upon any general statutes, but upon the peculiar phraseology of the sections of the act, and with reference to the course which, to use the language of the court, "the government would take with regard to this new source of untold wealth" which the discovery of the mines of California had brought to the United States.

It is true that in the syllabus of the case there is found the words of general import as "such lands (referring to mineral lands) were by the settled policy of the government excluded from all grants." But there is no such language in the decision; nor any words which imply that the court intended to say that in all grants which the United States had previously made, mineral lands were excluded from their effect.

Indeed, Judge Wait in the subsequent case of *Mullen v. United States* (*supra*) so quotes this part of that syllabus as to repel any such implication, by making it read thus: "such lands were by the settled policy of the general government excluded from all grants *at that time*." These three words "at that time" are very important in this connection. There is no doubt that it had at that time become the policy of the general government to exclude mineral lands from all grants then and thereafter made; but I repeat there is nothing in the decision to intimate that there is found in the legislation of Congress any settled policy to *repeal* grants specifically made by Congress *prior to that time*, and especially those of the character that were made by Congress to Alabama.

In order to understand properly the question of the nature of the right of Alabama to make selections of lands to cover deficiencies in the quantity of school lands granted to her, it will be necessary to refer to the legislation upon which the claims of Alabama rest. This will be found in marked contrast to the provisions of the California act which we have just been considering. In the enabling act approved March 2, 1819 (3 Stat., 489, Sec. 6) the following language is used:

And be it further enacted, That the following propositions be, and the same are hereby offered to the convention of the said territory of Alabama, when formed, for their free acceptance or rejection, which, if accepted by the convention, shall be obligatory upon the United States.

First. That the section numbered sixteen in every township, and when such section has been sold, granted, or disposed of, other lands equivalent thereto, and most contiguous to the same, shall be granted to the inhabitants of such townships for the use of schools.

Second. That all salt springs within the said Territory and the lands reserved for the use of the same, together with such other lands as may, by the President of the United States, be deemed necessary and proper for working the said salt springs, not exceeding in the whole the quantity contained in thirty-six entire sections, shall be granted to the said State, for the use of the people of the said State, the same to be used, under such terms, conditions, and regulations, as the legislature of the said State shall direct: Provided, The said legislature shall never sell, nor lease the same for a longer term than ten years at any one time.

This provision in regard to the sixteenth section and its devotion to school purposes was taken almost *totidem verbis* from the acts of Con-

gress organizing the Northwest Territories in pursuance to the great ordinance of 1787 and 1789. At the date of the act of March 2, 1819, there was no legislation on the subject of mines or mineral lands except two statutes passed respectively in 1805 and 1807, the effect of which was substantially to render null and void every grant of salt springs and lead mines thereafter to be made, knowledge of which had been discovered previously to the purchase from the United States. It will be seen from the quotation above made that the enabling act of 1819, for the State of Alabama, did not reserve or except such lands from the grant to Alabama. These provisions contained in the act of 1819 were accepted by the State, and the State admitted into the Union upon them, so that when Alabama was admitted there came into full force and effect the legislation which granted every section numbered sixteen in every township, and when such section had been sold, granted, or disposed of, other lands equivalent thereto and most contiguous thereto shall be granted. The State of Alabama thus became invested with the legal title to every sixteenth section according to the surveys, irrespective of the character of the lands upon which they were located, and in case of previous sale, grant or disposal thereof, the right of indemnity already existed in precisely the same character of lands.

That such a grant is to be construed with reference to provisions of law in force at this date with reference to mineral lands is settled by the Mining Company's case already cited, in which, speaking of this very question, the court says: "This is true of the statute under consideration and we may pass this branch of the argument by conceding that if the land in controversy is subject to the grants, the title relates to the date of the act of Congress" (meaning March 3, 1853, which was the date of the California act.)

The statutes of 1819, however, did not authorize the selection of equivalent indemnity lands in lieu of the sixteenth section, except where the same had been sold, granted, or disposed of. It was subsequently ascertained in this State, as well as in others, that there was a deficiency in the sixteenth section owing to other natural causes, and to carry out the original compact and grant to the States of the full quantity of land contemplated, the act of May 20, 1826 (4 Stat., 179) was passed which provided that wherever there was a deficiency in the sixteenth section "there shall be reserved and appropriated for the use of schools in each entire township or fractional township, for which no land has been heretofore appropriated or granted, the following quantities of land", and when so selected "said lands shall be held by the same tenure and upon the same terms for the support of the schools in such township as section number sixteen is, or may be held in the State where such township shall be situated." By the act of February 26, 1859, (11 Stat., 385) which was a general act applicable to all the States, it was provided that where legal settlements had been made upon sections sixteen and thirty-six, "other lands of like quantity are hereby appropriated to

compensate for deficiencies for school purposes where such sections sixteen and thirty-six are fractional in quantity or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever"; and in this act there is no exception or reservation, and it cannot be seriously questioned but that the statute of 1819 and this statute are *in pari materia*, and that this statute was designed to apply in precisely the same way as the original acts of grants to the respective States to which it was, in fact, amendatory.

The first statute making any distinction between mineral and agricultural lands passed subsequently to the enabling act of 1819 was that of September 4, 1851 (5 Stat., 453, Sec. 10).

This act contained the regulations as to the manner of entering public lands and disposing of them by private sale, but expressly reserved from pre-emption lands known as salines or mines. The exact words of the reservation were: "and no lands on which are situated any known salines or mines shall be liable to entry under, or by virtue of, the provisions of this act." The very terms of the act itself preclude the idea that it operated to repeal in any sense the act of 1819, for the admission of Alabama, or to affect the right of the State to the sixteenth section, or in its rights to indemnity. That grant was a special grant and the act of 1841 was a general act. By well known rules it will not be construed to repeal a special grant without express terms of repeal or a repugnance which is equivalent thereto. The language also excludes any such presumption of repeal because the provision of this act that no known salines "shall be liable to entry under the *provisions of this act*" creates a clear presumption that it was not designed to affect any other grant or act existing prior thereto. Not only this, but the act only excludes pre-emptions or private purchases, but does not purport to withdraw the land from the effect of previous grants or dispositions made by Congress. I think it may safely be concluded that up to the passage of the act of general indemnity, May 20, 1826, and the act of February 26, 1859, the school grants to Alabama would have given a valid title to any mineral lands, and that the indemnity selections would have been made upon the same character of lands. The case of *Cooper v. Roberts* (18 Howard 173,) seems to me to bear directly on this point.

Mr. Justice Campbell, after discussing the history and nature of the compacts between the federal government and the States, out of which grew the grants of the sixteenth sections, for school purposes, proceeds to say :

The ordinance of 1785 dedicated section number sixteen for the maintenance of public schools, and in each sale of the public lands there was by the same ordinance a reservation of one-third part of all gold, silver, lead, and copper mines within the township or lot sold. No reservations were afterwards made of gold, silver or copper mines until the acts of March 1847. By the act of March 26, 1804, and the act of

March, 1807, every "grant of a salt spring or lead mine thereafter to be made, which had been discovered previously to the purchase from the United States, was to be considered as null and void". (2 Stat., 279, Sec. 6; id. 449, Sec. 6.) These statutes indicate a policy to withdraw from sale lands containing these minerals. But the compacts have been made without such a reservation, nor has the usage of the land-office interpolated such an exception to the general grant of section number sixteen for the use of schools. The grant of section number sixteen for the use of schools can be executed without violating the spirit of the legislation upon salt springs or lead mines, and, as we have seen, no statute prior to the admission of Michigan into the Union contains an appropriation or reservation of other mineral lands. The State of Michigan was admitted to the Union with the unalterable condition "that every section number sixteen, in every township of the public lands, and where such section has been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to the State for the use of schools." We agree, that until the survey of the township and the designation of the specific section, the right of the State rests in compact—binding, it is true, the public faith, and dependent for execution upon the political authorities. Courts of justice have no authority to mark out and define the land which shall be subject to the grant. But when the political authorities have performed this duty, the compact has an object, upon which it can attach, and if there is no legal impediment the title of the State becomes a legal title. The *jus ad rem* by the performance of that executive act becomes a *jus in re*, judicial in its nature, and under the cognizance and protection of the judicial authorities, as well as the others. *Gaines v. Nicholson* (9 How. 356).

The question now arises whether the act of March 1, 1847 created legal impediment to the operation of this principle, either by the reservation of the land for public uses, or by its appropriation to superior claims. In March 1847, Congress established a land district in this region for the disposal of the public lands. It directed a geological survey for the ascertainment of those containing valuable ores, whether of lead or copper, and a report to the land office. It provided for the advertisement and sale of such lands, departing in a measure from that usual mode, as to the length of the notice and the amount of price; and in reference to the remainder of the lands, it applies the usual regulations. To the section containing these directions (9 Stat., 146, Sec. 2) there is added an exception from such sales, section number sixteen, "for the use of schools and such reservations as the President shall deem necessary for public uses". It has been argued, that this exception is only applicable to the lands, not contained in the geological report, and that the mineral lands "were appropriated and disposed of without reference to the school reservation by this section of the act". But it does no violence to the language to embrace within the exception all the sales, for which the section provides, and we cannot suppose, that Congress could be tempted, with the hope of a small additional price, which is imposed upon the purchasers of the mineral lands, to raise a question upon its compact with Michigan, or to disturb its ancient and honored policy. We think the interpolation which claims this as an exception in favor of Michigan, is to be preferred to that which excludes from her the mineral lands under this compact. And this conclusion is strengthened by the fact that the power of the President to make useful public reservations is connected in the exception with the school reservations. There could be no reason for limiting the power of the President to a

single class of the public lands, and to exclude him from another in the same district. We conclude that this act does not withdraw the mineral lands from the compact with Michigan.

The next general act relating to mineral lands is that approved July 1, 1864 (13 Stat., 343) which enacts "that where any tracts embracing coal-beds or coal-fields, constituting portions of the public domain, and which, as "mines," are excluded from the pre-emption act of eighteen hundred and forty-one, and which under past legislation are not liable to ordinary private entry, it shall and may be lawful for the President to cause such tracts, in suitable legal subdivisions, to be offered at public sale to the highest bidder, after public notice of not less than three months, at a minimum price of twenty dollars per acre; and any lands not thus disposed of shall thereafter be liable to private entry at said minimum". No clause in this act relates specifically to former grants to the State of Alabama, or other States, as providing that the indemnity lands which that State was authorized to select should be withdrawn from such selection.

There is no inconsistency between this act and the grant of the sixteenth section and indemnity lands to Alabama. The State will still exercise its right and select its indemnity lands according to the original true intent of the act, and the President of the United States will be authorized to execute the statute of 1864. I can find no other statutes of a general character, unless that of 1866 may be so called. It is true that from 1819 to 1875 a number of States have been admitted into the Union, and in the enabling act of each of these States, respectively, including Colorado, there has been legislation as to what lands within the State should be reserved from sale, what lands regarded as mineral, and what shall not be included within the sixteenth and thirty-sixth sections usually granted for school purposes. But all this legislation was special and in no wise relative to the State of Alabama, or having the effect of limiting the rights of that State under the act of 1819.

The same statement is true of a number of great land grants to railway corporations; in nearly, if not all of those whose lines traverse the great mineral States and Territories of the west, there was expressly reserved the mineral lands. But these reservations were also declared to apply only to the particular grant in the particular States and Territories involved. It was not until the statutes were revised that a section in the act of July 4, 1866, which reserved mineral lands from the operation of that act granting aid to the Iron Mountain Railroad in Arkansas, and in similar sections in the act of March 3, 1875, reserving mineral lands to the United States government from the grant to the people of Colorado, when framing the constitution, was made general as it now appears in section 2318 of the Revised Statutes. But it will be noted that all this legislation had the effect of reserving mineral lands from the consequences of the grants made in these various acts, and nothing more, and that when the provision was made general in

the Revised Statutes, it is simply that such mineral lands shall be reserved from *sale*, except as otherwise expressly directed by law; and it does not declare that mineral lands located in a given State may not be selected in accordance with the terms and provisions of the original enabling act, admitting each State into the Union, and, in my judgment, no one of these acts will bear a construction taking away from the State of Alabama her special and specific rights conveyed by a special act, prior to the passage of any of these later enactments upon the subject of mineral lands.

The tract of land involved in the present matter is coal land, but, as already shown, at the time of the admission of the State of Alabama there was no reservation or distinction in regard to coal lands, any more than other mineral lands, and it had no place, or meaning or effect upon the original act. That coal lands are to be regarded as mineral lands under the subsequent statutes of the United States in relation to California, is no doubt correct in view of the decision of the supreme court, in *Mullen v. United States*, that is lands on which there are large coal mines. In that case the supreme court only went so far as to hold that in view of the statutes of 1841 and 1864 known coal lands were mineral lands within the meaning of that term, as used in statutes applicable to the State of California. "This," says the court, "is a legislative declaration," etc.

The act of July 1, 1864, providing for the sale of tracts embracing coal lands or coal fields, continued in force until the act of March 3, 1873 (R. S., 2347-8), authorized the pre-emption and purchase of such lands in limited tracts. But the statutes, as to the other more precious metals or minerals in the public lands, continued under the limitations and restrictions of the statute of 1841 until July 26, 1866, Congress passed a general act introducing a new method of disposition of mineral lands. But the mineral lands referred to in this act were those containing the precious metals, and did not include saline land, lead or coal. Subsequently, in 1872, this language was changed, so as to apply to all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed. Pursuant to this legislation, all mineral lands were open to entry and purchase, the same as agricultural land, except under an entirely different system.

In none of this legislation, or in its policy, is there to be found intention to restrict the effect or meaning of the original act of 1819, which conferred upon the State of Alabama the title to every section number 16, when surveyed and when for any reason there was a deficiency to secure an equivalent in lands in the same district.

The fact that these lands have been reported to the General Land Office as being coal lands, does not take them out of the purview of the statute of 1819. Of course, if having been thus reported, they had been sold and disposed of before they were selected for the State, that would end the question; but having been selected before they were sold, the

selection, in my judgment, is operative, and gives the State the title to the lands and leaves the remaining lands to be disposed of in accordance with the laws applicable to the subject.

From the foregoing brief review of the legislation relative to the public lands, it is to be seen that the law for the disposition of agricultural lands continues about the same that it has always been; while the enabling acts for the various Territories since 1850 have developed a new system for the disposition of mineral lands, and from all this have been evolved the present statutes.

Under sections 2347 to 2352 of the Revised Statutes coal lands are subject to pre-emption and entry precisely the same as agricultural lands, except as to price and limit as to the amounts which may be entered.

The provisions are general, and were as applicable to Alabama as to any other States, so, at the time the act of 1883 was passed, declaring what mineral lands should be disposed of as agricultural lands, coal lands were subject to entry and purchase at private sale, the same as agricultural lands, subject to the distinction just mentioned. But, as repeatedly stated heretofore, the provisions of the law relating to coal lands no more repealed the enabling act of 1819 or took away from the State its rights under that act, than the subsequent laws, changes and modifications did with reference to agricultural lands. The only difference between the two classes of lands was, and is, that one should be entered for a dollar and a quarter per acre, while the others require from ten to twenty dollars per acre, depending upon their location.

The mere fact that the government demands at private sale a greater price for some lands than it does for others is no reason that the act of 1819 was not applicable to both kinds of lands. In other words there is nothing to show that the State is not entitled under the act of 1819 to select any land which it might have originally selected under that act.

This being the condition of the case, what effect did the act of March 3rd, 1883, have upon it? The provision "Within the State of Alabama all public lands whether mineral or otherwise shall be subject to disposal only as agricultural lands; provided however that all lands which have been heretofore reported to the General Land Office as containing coal and iron shall be first offered at public sale."

This statute must be construed and understood with reference to the status of the law as just explained, which is that agricultural land and mineral land are both subject to private entry and pre-emption according to the terms respectively provided. These terms recognized that there were two classes of lands within the state of Alabama, agricultural and mineral, and it is proposed, as to that state to disestablish the distinction and regard them all as agricultural lands; but prior to that act, certain lands had been reported to the General Land Office as containing coal, and unless some provisions were inserted that class of

lands which had been previously dealt with as mineral lands under the mineral law system would fall back into the other system applicable to agricultural lands and be disposed of as homesteads etc. or at a nominal price. This Congress was not willing should occur and to prevent it, the proviso was inserted that all lands which have heretofore been reported to the General Land Office as containing coal and iron shall be first offered at public sale. The only meaning that can attach to the clause is that before this class of lands shall become subject to homestead right or private purchase it shall be offered at public sale. But it does not provide that this class of lands shall be first offered at public sale before it shall be subject to the rights of the State to make its selections under and according to the intent of the enabling act of 1819.

The proviso is to the body of the act and not to the statute of 1819.

Its meaning is to except from or take out of the declaration that the mineral lands shall be thereafter disposed of as agricultural lands, and it does not provide that before the State of Alabama shall exercise her rights and privileges under the act of 1819 these lands shall first be offered at public sale. To this statute is the rule also applicable that a special right or privilege conferred by a special act will not be taken away by any general legislation without express words requiring it.

The same observations heretofore made with reference to the general policy of the federal government to withhold or reserve mineral lands from sale may be said to be applicable to the act of April 23, 1884, granting to the State of Alabama certain lands for university purposes. If prior to that statute there were express provisions reserving from any and all dispositions the mineral lands of the United States and disclosing a public policy applicable to all grants, to withhold them from the effect thereof, the act of April 23, 1884, that passed subsequent thereto would be affected and controlled by them, for all statutes are to be considered *in pari materia*. But it seems that there is no such general legislation, no such general policy to be found, and it was decided by my predecessor and it seems to be conceded that by the act of April 23, 1884, the State would have the right to select mineral lands as well as agricultural lands according to its terms.

The case is really stronger in favor of the act of 1819, for as already stated that statute is in the nature of a compact. It was enacted and created the rights of the respective parties before any such legislation and policy as that just referred to came into existence, and no construction is to be put upon the subsequent legislation of Congress which puts the government in the attitude of repudiating or in any manner limiting the provisions of a compact of this kind.

In conclusion, whatever legislation can be found upon the subject of mineral lands, reserving them. the effect has always been reserving them either from the effect of the particular grant in which the reservation is found or else reserving them from cash sales at private entry,

but I have not been able to find any provision that there has been any reservation from the effect of former grants in which no such provisions of reservation are to be found. Indeed in almost the entire history of grants of this character reservations have been uniformly inserted in favor of former grants such as, that the grant hereby given is not to be held to include any lands heretofore granted or reserved for any purpose whatever.

In my opinion, upon these considerations, the State of Alabama has the right to select the lands in question.

CANCELLATION OF ENTRY—SALE BEFORE PATENT.

WILLIAM E. MCINTYRE.

The sale or encumbrance of the land after final proof brings no new element into the case when the validity of the entry is under consideration.

The right of the party in interest, as grantee or mortgagee, to appear and maintain the validity of the entry is recognized; but if such entry, prior to patent, is found to be invalid, it will be canceled, irrespective of the interest of subsequent grantees.

An entry should not be canceled on the report of a special agent.

The Land Department has full authority to cancel fraudulent entries.

Secretary Vilas to Acting Commissioner Stockslager, January 30, 1888.

This case was certified to me under certiorari proceedings reported in 4 L. D., 527.

William E. McIntyre filed his application for homestead entry for the NW. $\frac{1}{4}$ of Sec. 30, T. 135 N., R. 63 W., Fargo land district, Dakota Territory, July 5, 1882, and commuted same to cash entry June 5, 1883, and on the same date conveyed same by warranty deed to one Jane B. Noyes, the consideration named being sixteen hundred dollars. Noyes deeded by warranty deed to George B. Phelps the same tract with other property, the consideration named being one thousand dollars, and also on the same date deeded same tract with other property to Hazen and Clement by warranty deed, the consideration named being one hundred dollars.

On the 14th of August, 1883, the entry was canceled for fraud upon the report of a special agent. October 22, 1883, Noyes made application for hearing through the local office. April 30, 1885, a hearing was had pursuant to the Commissioner's order, when all of the parties in interest appeared by attorney and moved to dismiss the proceedings, for the reason that no complaint was filed against the land of said McIntyre or those holding under him, and that no information or definite information had been furnished the attorney or parties of the nature and cause of the accusation against them.

The motion was denied and the government offered three witnesses who testified to the meagre improvements upon the land, and that McIntyre

never established or maintained a residence upon the land. The attorney for McIntyre, *et al.* declined to cross-examine the witnesses or to offer any testimony in support of the entry, or to impeach the witnesses who testified upon behalf of the government, preferring to rely upon the position that the testimony offered did not outweigh that accepted by the local office, and that Noyes *et al.* being innocent purchasers were entitled to protection as such, there being no fraud or bad faith upon their part. All of the questions in this case have frequently been decided by the Department in similar cases and the rules are so well settled that it is only deemed necessary to refer to them.

It is uniformly held that the sale or encumbrance of the land after final proof brings no new element into the case when the validity of the entry is under consideration. John C. Featherspil (4 L. D., 570); George B. Thompson (6 L. D., 263).

The Department recognizes the right of the party in interest as grantee mortgagee etc., to appear and be heard for the purpose of assisting to maintain the validity of the entry (see case of R. M. Sherman, *et al.* 4 L. D., 544), yet where the invalidity is made to appear at any time prior to the issue of patent, the government has the right, and it becomes the duty of the Department charged with due enforcement of the land laws to cancel the entry, notwithstanding the interest of subsequent grantees or mortgagees. To all such the rule of *caveat emptor* applies. R. F. Pettigrew *et al.* (2 L. D., 598); Root *v.* Shields (1 Wool., 564); Charlemagne Tower (2 L. D., 780); Whitaker *v.* Southern Pac. R. R. Co. (2 C. L. L., 919).

While the practice in this case under consideration was irregular in cancelling the entry of McIntyre August 14, 1883, upon the report of the special agent (see the Le Cocq cases decided December 13, 1883), since which time the practice uniformly requires a hearing before cancellation, after entry has been made. See Henry Cliff (3 L. D., 216); United States *v.* Copeland (5 L. D., 170); and George T. Burns (4 L. D., 62). Yet it appears that this error was in effect cured by the hearing which was afterwards had pursuant to your order of April 4, 1884, and the parties in interest have therefore had their day in court.

The testimony taken at the hearing fully established fraud on the part of the entryman.

The land department has full authority to cancel entries for fraud. (2 L. D., 599 & 783.) The following are the appellant's assignments of error:

- 1st. The Commissioner had not power to adjudicate a forfeiture of land or money, nor to avoid or annul a sale made under the public land laws.

- 2d. The complaint does not state facts sufficient to constitute a cause of action or forfeiture.

- 3d. The facts found by the Hon. Commissioner do not constitute a cause of forfeiture and the evidence does not tend to establish any such cause.

4th. The evidence shows that the land is now owned by bona fide purchasers, hence the proceeding should have been dismissed.

An examination of the entire record and the testimony taken at the hearing convinces me that none of such assignments of error are tenable.

Your action of September 25, 1885, refusing to re-instate said entry, and adhering to your action of August 14, 1883, cancelling the same is hereby affirmed.

TIMBER CULTURE ENTRY—AMENDMENT—SECOND ENTRY.

A. J. SLOOTSKEY.

Under the established usages of the Department, and in accordance with principles of equity, applications to amend so as to take the land intended to be entered, are granted, where the entryman can show a satisfactory excuse for the mistake. An application to change an attempted entry of one tract to that of another, is not an application to amend, but to make a second entry, and should not be allowed through the process of amendment.

Where an amendment, in accordance with the original purpose of the applicant, would be permitted, but for the existence of an intervening adverse claim, it should not be held that the right to make an entry has been exhausted.

Second timber culture entries are allowed where, through no fault of the entryman, the first cannot be carried to patent.

The same principle governs the allowance of a second timber culture entry as obtains in the case of a second homestead entry.

Secretary Vilas to Acting Commissioner Stockslager, January 31, 1888.

The record discloses that on the 16th day of January, 1885, the appellant, A. J. Slootskey, applied at the North Platte, Nebraska, land office to enter under the provisions of the act of June 14, 1878, the north-west quarter of section 8, in township 9, north of range "37," west of the 6th principal meridian, and having complied with the usual requirements, received the receiver's receipt for fourteen dollars, the amount of the fee in compensation of the register and receiver; that on the 3d day of June, 1886, he applied to the same land office to "amend" his entry because of an alleged mistake in the description, whereby the entry was made in range "37" when his intention was to enter the corresponding tract in range "36," and alleged by affidavit, corroborated in part by other witnesses, that the misdescription occurred by inadvertence and clerical mistake, that the land actually described is poor, rough, sandy land, unfit for cultivation, and had not been seen by him until after the discovery of the mistake in the description, while the north-west quarter of section 8, township 9, range 36, had been by him personally examined before the entry, and was suitable to timber culture, and the tract intended to have been entered by him. The appellant does not explain the manner in which the mistake occurred, other than by the statement that it was through inad-

vertence and by mistake, but the facts above stated tend to support his claim. He alleges the discovery of the mistake to have been made in the fall of 1885, when he "was going to get the breaking done" on the claim. No further explanation of the manner of the discovery is made, nor of his delay in the application to amend until the following summer. He states that the tract he intended to have entered was entered on the 13th of May, 1885, as a homestead, and, apparently, recognizing this as a bar to the correction of his application to correspond to his purpose, he asks to amend the original application for entry so as to designate the south-west quarter of section 12, township 10, range 34, as the tract entered. It further appears from the records of the Land Office that the north-east quarter of section 8, township 9, range 36, was applied to be entered as a timber culture entry by William W. Harper, on the 25th day of March, 1885, so that thereby an intervening timber culture right upon the section in which the appellant originally designed to make his entry had been established before the discovery of his mistake. Upon this case, you decline to grant the appellant's request to amend, because it did not appear that he had used proper care in making his entry, and because amendments to embrace land not originally intended to be entered cannot be allowed.

If this application had been to amend the original entry, in accordance with the original purpose of the entryman, so as to designate the tract he had examined and intended to enter, and if no intervening right inconsistent with his proposed entry had been established, I think the application to amend should have been granted; certainly, if he satisfactorily excused his contribution to the mistake this would have been the rectification of a simple error without injury to the rights of others, and would have been demanded upon the plainest principles of equity and the established usages of the Department, as shown by various decisions. *Jefferson Newcomb* (2 C. L. O., 162); *Brown v. West* (3 L. D., 413); *Bennett v. Cottnach et al.* (1 L. D. 159); *Neubert v. Midden-dorf* (10 C. L. O., 34); *Daniel Keese* (5 L. D., 534); *Johnson v. Gjevve* (3 L. D., 156); *Pellerin v. Outgers*, (4 L. D., 529).

But this is not an application to amend. It was an application to change an attempted entry of one tract, to an entry of another very different one. It asks the Land Office to relieve the applicant of the consequences of his mistake by permitting him to do something which he did not originally attempt to do, but which he now asks in compensation for the loss which his mistake occasioned. To permit this would not be an exercise of the power to allow amendment to correct a mistake, and would operate a fraud upon the statute under which the application is made. The entry upon the south-west quarter of section 12, township 10, range 34, would stand as having been made on the 16th of January, 1885, while actually done in the summer of 1886, so that it would be impossible that the party in the first year following his entry should have broken or ploughed five acres with a view to cultivation.

The true nature of this application was to make a second entry, and this, though in some cases allowable, ought not to be permitted through the process of amendment. Your decision was, therefore, correct, and is affirmed.

But, on the assumption that the mistake can be shown to have been fairly excusable, the appellant ought not to be held to have entered the tract in range 37, so as to be barred of the privilege of an entry under the provisions of the act in question. That act forbids to the same person to make more than one entry of the kind. Inasmuch as this entry might have been corrected in accordance with the original purpose of the applicant but for an intervening right,—on the assumption mentioned,—it ought to be held that he has not enjoyed the privilege of one entry, because his real attempt has been defeated by the intervening right of another without bad faith or any other than excusable neglect on his part.

Second timber culture entries have been allowed when, through no fault of the entryman, the first entry could not be carried to patent (*R. E. Gilfillan*, 6 L. D., 353.); and it has been ruled that the same principle governs the allowance of a second timber culture entry as obtains in the case of a second homestead entry. *Christian Zyssett* (6 L. D., 355); *Ferguson v. Hoff* (4 L. D., 491); *Bracken v. Mecham* (6 L. D., 264); *Hannah M. Brown* (4 L. D., 9); *Goist v. Bottum* (5 L. D., 643); *Allen v. Baird* (6 L. D.; 298); *Kate Walsh* (6 L. D., 168).

Your decision is, therefore, affirmed, with the modification that it be without prejudice to the right of the appellant to apply again to make a timber culture entry upon such showing of facts as shall explain and excuse satisfactorily his neglect and want of care in making the original mistake, if mistake it really was, in the preparation of the entry papers.

RAILROAD GRANT—DOUBLE MINIMUM LAND.

HARVEY G. JUDD.

After the map of general route of the Northern Pacific was filed, the even sections, within the grant limits, could not be sold at a less price than two dollars and fifty cents per acre.

Where an entry within such limits was allowed at single minimum the entryman will be required to make a further payment of one dollar and twenty-five cents per acre, or relinquish one half of the land entered.

Secretary Vilas to Acting Commissioner Stockslager, January 31, 1888.

Harvey G. Judd filed declaratory statement No. 64 June 12, 1872, alleging settlement June 22, 1871, upon the NE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ and lots 3, 4 and 5, Sec. 8, T. 138 N., R. 41 W., Oak Lake (now Crookston), Minnesota. January 10, 1873, he paid for the land with Georgia agricultural

college scrip No. 1558 (R. & R., Oak Lake No. 78), at one dollar and twenty-five cents per acre.

Your office letter "G", dated June 28, 1873, required Judd to make "additional payments of \$1.25 per acre, for the reason that the lands are double minimum in value."

In response to claimant's application, of September 22, 1873, to be allowed to make payment any time within thirty-three months from date of filing plat of survey, to wit, March 26, 1872, your office letters of October 4, and 23, 1873, permitted said entries to remain suspended, awaiting the additional payments required.

November 19, 1875, the register reported that the claimant had been notified of the foregoing, "but had failed to take any action in the matter."

Judd now appeals from your decision of March 29, 1886, holding his said entry for cancellation, "on account of failure to make the additional payments required."

The records of your office show that the land in question is within the limits of the grant by act of July 2, 1864 (13 Stat., 365), to the Northern Pacific Railroad, and that the map of general route of the said road opposite this tract was duly filed August 13, 1870. Section six of the granting act, which reserves the odd sections within said grant for the railroad company, provides that the "reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty-cents per acre when offered for sale."

Counsel for the claimant insist that the rights of the said company did not attach to the land embraced within its grant until December 19, 1871, the date of filing its map of definite location.

Your office decision in *Vaughan v. The Northern Pacific Railroad* (12 Copp, 302), upon which counsel rely, has been reversed by departmental decision of July 1, 1887 (6 L. D., 11), wherein it was held, upon the authority of *Buttz v. Northern Pacific Railroad* (119 U. S., 55), that:

When the *general route* of the road, provided for in section six of the act of July 2, 1864, was fixed and information thereof was given to the Land Department by the filing of a map thereof with the Secretary of the Interior, the statute withdrew from sale and pre-emption the odd sections, to the extent of forty miles on each side thereof.

The land within the limits of the said grant therefore, on and after August 13, 1870, the date of filing the map of general route, became subject to the operation of the act of 1864 (*supra*), and in accordance with the said provisions thereof the reserved (even) sections could not be sold for a less price than two dollars and fifty cents per acre. This view is also sustained by the decision of the Department in *Lawrence W. Peterson* (11 C. L. O., 186).

Judd does not claim to have made settlement until June 22, 1871. The entry at one dollar and twenty-five cents per acre was therefore erroneously allowed by the local office.

While it is probably true that the claimant's entry could be legally canceled, it is still a fact that the question herein has not been heretofore adjudicated, and also that no other rights have intervened.

I fully concur in your conclusion that, before the claimant's entry is passed to patent, he should make the required additional payment, but in view of the foregoing he should be permitted to do so within a reasonable time after notice hereof, or to relinquish either the one half or the whole of his said entry.

You will therefore allow the claimant, within ninety days after notice hereof, either to make such payment, or to elect whether he will relinquish the one half or the whole of his said entry, and upon proper application to receive, as the case may be, a patent for the remainder of the land in question, or to have the payment hereinbefore made refunded. In default of action in accordance herewith, you will cancel the said entry.

Your decision is modified accordingly.

*CONTESTANT'S PREFERENCE RIGHT—NOTICE OF CANCELLATION—
ATTORNEY.*

ALBERT S. BOYLE.

When an attorney enters his appearance in a case his authority is presumed, yet this presumption is not conclusive, but may be inquired into by either party to the case, or the tribunal before which he appears.

The Department requires attorneys at law who appear before the local land office to file their written appearance, stating specifically for whom they appear. Attorneys in fact are required to file written authority of their principals.

Notice of cancellation sent to an attorney whose appearance for the contestant was erroneously entered of record is not notice to the contestant, nor is he in any manner bound thereby.

An entry, made when the record showed that the preferred right of a successful contestant to enter the land had expired, should not be canceled on a showing that the contestant in fact received no notice of cancellation, without according to such entryman a right to be heard.

Secretary Vilas to Acting Commissioner Stockslager, January 31, 1888.

The question involved in this appeal is the sufficiency of the notice of preference right.

Albert S. Boyle instituted successful contest against the homestead entry, No. 2526, of one Paul Marlin for the W. $\frac{1}{2}$ of NW. $\frac{1}{4}$ and NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ Sec. 11, T. 6 N., R. 26 W., Frontier county, Nebraska, and same was canceled by your office April 4, 1885, for non-compliance with the law. Notice of this decision, it is claimed by your office, was sent J. E. Cochran, as attorney of Boyle, April 8, 1885.

Boyle denies that he received any notice until he made inquiry of the local office, by letter, about August 24, 1885, when he was first informed

by the local office of the cancellation of Marlin's homestead entry, and that the land had been entered by Walter G. McMichael August 17, 1885.

He also denies, by affidavit, that J. E. Cochran was his attorney, or in any manner authorized to receive notice, or appear for him. The attorney also denies under oath that he was the attorney for Boyle, or that he ever appeared for him as such in said contest.

On the 22d of September, 1885, Boyle made due application for homestead entry for the land in question. His application was rejected by the local office, for the reason that said land was embraced in the homestead entry of Walter G. McMichael.

From this action Boyle appealed, and on the 14th of July, 1886, you affirmed the action of the local office. From this decision Boyle now appeals, upon the ground that your decision is in conflict with the provisions of the act for relief of settlers on public lands, approved May 14, 1880 (21 Stat., 140). Section two of said act provides that:

Where any person has contested, paid the land office fees, and procured the cancellation of any pre-emption, homestead, or timber-culture entry, he shall be notified by the register of the land office of the district in which such land is situated of such cancellation, and shall be allowed thirty days from date of such notice to enter said lands, *Provided* that said register shall be entitled to a fee of one dollar for the giving of such notice to be paid by the contestant.

The record discloses the fact that the appellant contested, paid the land office fees, procured the cancellation of the homestead entry of Paul Marlin to the land in question, and that he paid the register his fee of one dollar for giving the notice; that the register mailed notice to J. E. Cochran, as the attorney of the appellant. The appellant admits in his affidavit that the name of one J. E. Cochran was noted on the docket as his attorney, but alleges that such entry was error; that said Cochran was not or has not been his attorney in said case, and that he only employed him to draft his contest affidavit, for which service he paid him, and that his services thereupon terminated.

The attorney in an affidavit corroborates the appellant as to his employment, and denies that he ever appeared as the attorney for appellant in said case, or that he was ever employed to appear, and that he had no connection with the case further than the writing of the affidavit and notices.

These affidavits are not disputed or controverted. It therefore appears that he never received the notice of his preference right, to which he was entitled under the law, and that the notice sent was as to him, no notice.

While it is true as a general rule that when an attorney enters his appearance in a case his authority is presumed, yet this presumption is not conclusive and may be inquired into by either party to the case or the tribunal before whom he appears.

In the case of *Shelton v. Liffin et al.* (6 Howard, 162) one Crawford entered his appearance for the defendants. No process was served upon one of the defendants, L. P. Perry, and without his appearance by the attorney Crawford, the court would not have acquired jurisdiction as to this defendant. The attorney testified that he had no recollection of having received any authority from L. P. Perry, or from any one in his behalf to defend the suit, and that he regarded his appearance on behalf of any other person than John M. Perry (another defendant) as an inadvertence on his part.

McLean J, in rendering the opinion of the court, says:

This evidence does not contradict the record, but explains it. The appearance was the act of the counsel and not of the court. Had the entry been made that L. P. Perry came personally into court and waived process, it could not have been controverted, but the appearance by counsel who had no authority to waive process may be explained. An appearance by counsel under such circumstances to the prejudice of a party would subject the counsel to damages; but this would not sufficiently protect the rights of the defendant. He is not bound by the proceedings, and there is no other principle which can afford him adequate protection. The judgment therefore against L. P. Perry must be considered a nullity.

This principle is again recognized by the supreme court in the case of *Hill v. Mendenhall* (21 Wallace, 453). Waite C. J., in his opinion, says:

When an attorney of a court of record appears in an action for one of the parties, his authority in the absence of any proof to the contrary will be presumed. A record which shows such an appearance will bind the party until it is proven that the attorney acted without authority.

In that case the court held that such a defense was not admissible under the plea of *nul tiel* record, yet the court remanded the case for a new trial, with permission to so amend the pleadings as to authorize the defense.

The Department has recognized the correctness of this rule of practice as enunciated by the supreme court in the foregoing cases, and permits the party claiming the benefit thereof to show as a matter of fact that the attorney who appeared, or assumed to act as such, acted without authority. See *Deakins v. Matheson* (6 L. D., 269).

No man has the authority to appear as the attorney of another without the authority of that other. The power must in fact exist. *F. M. Heaton* (5 L. D., 340).

The Department requires attorneys at law, who appear before the land office, to file their appearance in writing, stating specifically for whom they appear. Attorneys in fact are required to file written authority of their principal. See circular of December 15, 1885. (4 L. D., p. 299). See also circular of July 31, 1885 (4 L. D., 503); *Williams v. McIntyre* (4 L. D., 527); and circular of February 1, 1886 (5 L. D., 337).

In the case under consideration, there is not only no evidence that the attorney entered his appearance in the case, but, on the contrary,

he swears that he never did so appear, but, that his services were limited to drafting papers. His attorneyship ceased therefore upon his performance of that duty. Caldwell and Smith (3 L. D., 128).

The difficulty in justly deciding this case arises from the fact that rights of the successful contestant, or the subsequent homestead entryman, must be sacrificed, and without either being in fault. Walter G. McMichael, relying upon the record of the local office that more than thirty days had elapsed after contestant had been notified of his rights, and had failed to avail himself thereof, made homestead entry of the tract August 17, 1885. While the law is plain that, if Boyle never received notice under said section two of the act of May 14, 1880, McMichael's entry must be canceled, yet in order that his rights may be preserved to the fullest extent possible, he should be allowed his day in court, and the opportunity of contesting the question and controverting the claim made by Boyle that he failed to receive the cancellation notice.

You will therefore cause notice to issue to the said Walter G. McMichael to show cause why his homestead entry of the tract in question should not be canceled and the entry of said Albert S. Boyle allowed as herein indicated.

FINAL PROOF—ADJOURNMENT—RESIDENCE—RELINQUISHMENT.

FALCONER v. HUNT ET AL.

The local officers have authority under the law to adjourn the submission of final proof, on account of the press of business, to a day certain, and take such proof on the day so fixed.

Credit may be allowed an entryman on the submission of homestead proof, and in the absence of an intervening adverse claim, for a period of residence preceding his homestead entry, and while the land was covered by a timber culture entry previously made by said entryman.

A relinquishment executed after final proof, and after the entryman had parted with all interest in the land, is null and void.

The case of McCall v. Molnar cited and distinguished.

Secretary Vilas to Acting Commissioner Stockslager, February 4, 1888.

December 8, 1882, Alexander W. Cameron made homestead entry No. 1216 of the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 12, T. 138 N., R. 80 W., Bismarck, Dakota. May 28, 1883, he made final proof before the local officers at Bismarck, showing residence from about May 1, 1878, extensive and valuable improvements, valued at \$3000, and a thorough compliance with the homestead law in every respect. This proof was rejected by your office January 13, 1886, because it had not been made on the day advertised, to wit, May 24, 1883, and claimant was given ninety days within which to make new proof after due advertisement, or sixty days in which to appeal. Upon re-

ceiving notice of this decision, Cameron, on the 29th of March, 1886, executed and filed in the local office a relinquishment of both his original and final homestead entries, and said entries were thereupon canceled on the records of the local office. At the same time one Daniel A. Falconer, who it appears is a brother-in-law of Cameron, and who is appellant here, was allowed to make homestead entry No. 3956 of the land in dispute.

April 3, 1886, the local officers transmitted this relinquishment to your office. In said letter of transmittal were enclosed the respective petitions of Charles Kupitz and George T. Webster, asking that said relinquishment be declared a nullity, that said entries be re-instated, and that one Zolman S. Hunt be allowed to intervene in the case.

Thereupon, on the 28th of December, 1886, your office considered the case, and rendered a decision, refusing to cancel Cameron's entry on the relinquishments presented, but formally re-instated it, approved the final proof aforesaid, and held the entry of Falconer for cancellation. Appeal by Falconer from this decision brings the case here.

The interests of Kupitz, Webster and Hunt in this case will appear from the following recital of record facts. After receiving his final certificate, Cameron being desirous of further improving his farm, borrowed of one Zolman S. Hunt at one time \$1300, and at another time \$700, giving him as security for the debt two mortgages on the land in controversy, each of them signed by himself and wife. The first mortgage, for \$1300, was dated May 29, 1883, and was recorded on the following day. The second mortgage, for \$700, was executed January 22, 1884, in favor of George T. Webster, Hunt's financial agent and attorney, and was recorded January 24, 1884. Webster subsequently assigned this mortgage to Hunt, who it appears was the real mortgagee in the case from the first.

On the 14th of February, 1884, Cameron and wife in consideration of \$250 executed and delivered to Charles Kupitz a warranty deed for all that portion of the tract lying east of Apple Creek, the same being ten acres more or less. This deed was recorded on the same day as its execution.

Afterwards, to wit, on the 4th of September, 1885, Cameron, in consideration of the purported sum of one dollar, executed and delivered a quit claim deed for the whole tract in favor of his wife, Jane Cameron, and the same was recorded on that day.

Default having been made in the payment of the sums mentioned in the said mortgages, the sheriff of the county in which the lands are situated, by virtue of the power of sale contained in each of said mortgages, the territorial law governing such matters having been complied with, executed and delivered to one O. P. M. Jamison a certificate of mortgage sale of the land and its appurtenances, which was recorded September 14, 1885. Jamison, on November 12, 1885, assigned said certificate of sale to Hunt, who thus became entitled to the rights acquired at the sheriff's sale aforesaid.

It is to be noted that the deed from Cameron to his wife antedates that of the sheriff by one day, and that all of the proceedings herein mentioned relative to transfer of the land occurred prior to the decision of the Commissioner of the General Land Office rejecting Cameron's final proof.

An examination of the papers in the case shows that no objection can be taken to Cameron's final proof because it was not made on the day advertised. He had given the legal notice of his intention to make his proof on the 24th of May, 1883, and on that day went with his witnesses to the local office prepared to make the proof required. The register, under date of April 29, 1886, certifies that :

By reason of the press of business then before the office, the taking of said proof was by the register and receiver postponed to May 28, 1883, at which time said parties again appeared and said proof was duly made and submitted.

From this statement of the register it is apparent that the law with respect to the notice of taking final proof was in all respects substantially complied with. The adjournment of the taking of said proof by the local officers to a day certain because of the press of business, and the taking of the proof on the adjourned day, were proceedings justifiable under the law, and no objection can be taken to the proof on this score.

This view of the case in no wise conflicts with the decision in the case of Alfred Sherlock (6 L. D., 155). Another objection urged against Cameron's proof is much more serious, and deserves a very careful consideration. This objection was in no wise passed upon by your office, but is made by Falconer here on appeal. It is this:

For over four years of Cameron's residence on this tract, the same was embraced in his timber culture entry. It is shown by the records that he made timber culture entry of the land in controversy January 15, 1878, and continued to hold the land under such entry until the date of his homestead entry, December 8, 1882, when said timber culture entry was relinquished.

The question is can Cameron have credit for his residence on this land while it was embraced in his timber culture entry?

The principle in the case of *McCall v. Molnar* (2 L. D., 265), if carried to its logical sequence would seem to answer this question in the negative. In that case Molnar had made timber culture entry of a tract of land in 1879, and sometime thereafter built a house on said land, and made it his home. After Molnar's settlement on the land, McCall brought contest against the timber culture entry charging failure to comply with the law and at the same time filed his own application to enter the tract as permitted by the timber culture act of 1878. Before hearing had been had in this contest, Molnar relinquished his timber culture entry and at the same time entered the tract under the homestead law, claiming settlement and residence anterior to the date of the initiation of the contest aforesaid.

McCall afterwards (within thirty days from the cancellation of Molnar's entry on relinquishment) attempted to enter the land as a successful contestant, but was refused the right of doing so by the local officers, because of the rights of Molnar under his said homestead entry.

Upon final judgment by the Secretary of the Interior, it was ruled as follows:

The local office properly enough allowed Molnar to make homestead entry for the land after filing his relinquishment but such entry was subject to the assertion of McCall's superior right as a successful contestant.

Molnar will not be permitted to assert any right as a homestead claimant which he attempted to initiate while holding the land under the appropriation of his timber culture entry. While the entry existed, the land was not public land, and he could only, during such time, acquire further rights to the land by complying with the timber culture law.

The principle involved in this case just cited seems to be that the land having been segregated from the public domain by the timber culture entry of Molnar, it was not subject to his settlement under the homestead law.

This same principle is announced in the following decisions of the Commissioner of the General Land Office: Michael McVey, Eli Ewell Kate Cox, and Fergus H. Flom. (1 L. D., 37, 46, 52 and 58, respectively). In all these cases, however, decided by the Commissioner, except the last one, the homestead settler had made settlement on the land covered by the entry of *another* person and was seeking to have his settlement rights antedate the cancellation of said entry. In the Flom case, the claimant had settled on a tract of public land and filed a pre-emption declaratory statement therefor in 1872. In 1877 he made timber culture entry of same tract, his said filing not having been canceled. He relinquished said timber culture entry in 1879, made homestead entry of the same tract later in same year, and made final proof in 1882, in support of his homestead entry. His proof was accepted, on the ground that his filing never having been canceled could be transmuted to homestead entry after the cancellation of his timber culture entry, and residence could then be claimed from the date of actual settlement under the act of June 14, 1878 (20 Stat., 113).

The general rule of the land office on the question here in issue was stated in that decision as follows:

Parties who have relinquished timber culture entries upon which they had established residence, and subsequently made homestead entries for the same land, have, upon offering final proof and claiming under the act of May 14, 1880, the benefit of residence prior to date of homestead entry, been restricted in such claim to actual residence subsequent to the cancellation of the timber culture entries, it being held that a party cannot, in perfecting a homestead entry claim the benefit of residence upon the land while embraced in his timber culture entry.

But that case was made an exception to the general rule as stated, because of its peculiar facts heretofore recited.

If that rule is to be followed strictly in this case it will defeat the final proof of Cameron, and the claims of parties asserting title under him. The reason of this rule undoubtedly lies in the fact that it is unwise and illegal to allow one party to initiate settlement rights to a tract of land while the same is in the possession and under the control of another, it being always a reasonable and legal presumption that an entry made by any party is made for his own use and benefit, and for the purpose of acquiring title to the land by complying with the law under which he entered; for to allow a claim initiated as set forth above, would be (in the language of *Atherton v. Fowler* 96 U. S., 513), "to invite forcible invasion of the premises of another, in order to confer the gratuitous right of preference of purchase on the invader." But in a case where the antecedent entry is made by the settler himself, this reason does not exist. Here there is no forcible intrusion upon the premises of another, and there is no invasion of another's rights. The settlement is made upon land claimed by himself alone. He is the only person who in law can have the right to object to his own settlement and residence on his timber culture entry, and such objection it is absurd to suppose would ever be made.

The right of the homestead settler to have his residence antedate his entry in certain cases is derived from the third section of the act of May 14, 1880 (21 Stat., 140). That section provides:

That any settler who has settled, or shall hereafter settle, on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States Land Office, as is now allowed to settlers under the pre-emption laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he settled under the pre-emption laws.

What is evidently meant by the phrase *public lands* as used in this statute is *public* in the sense that no other party had any claim to them. It was ruled in the case of *Owen D. Downey* (6 L. D., 23), that a desert entry made of land embraced in an abandoned timber culture entry of record, should, upon the cancellation of said timber culture entry date from the day it was actually made; and that the three years within which to reclaim the tract from its desert condition, would commence to run from that date. That ruling is surely as broad as the one contended for here.

The manifest purpose of the act of May 14, 1880, was to give the homestead settler credit for the full period of time he may have resided upon his claim, and made it his home. The full period required in order to submit final proof is five years. Section 2291, U. S. Revised Statutes. As a matter of fact when Cameron offered his final proof he had actually resided upon the land claimed by him, and had made it his home for more than five years. His residence had been established early in 1878, when no other person than himself had any semblance of claim to the

tract in controversy. He had not invaded the rights of any person in making his settlement then, and had not trespassed upon the premises of any one. The land was then public lands except so far as his own timber culture entry was concerned. That entry might have been attacked for failure to comply with the law, and he would have been precluded from setting up his residence on the land to defeat the contest. But that does not signify in a determination of this case. Had there been no entry there at all; and had Cameron not made homestead entry prior to the time he did; and had another party settled upon the tract in good faith and filed a proper notice of his claim in the land office before Cameron filed, such party would have defeated Cameron's claim under section 2265 U. S. R. S. But had there been no entry of record when Cameron settled, and had no adverse claim intervened before he made his entry in 1882, there can be no doubt that final proof offered in 1883 would have been accepted at once, upon the theory that he lost no rights as against the government by failing to file within three months from the date of settlement. The filing is for the protection of his claim against adverse interests.

Upon the same principle residence on land covered by a timber culture entry while not available against an adverse claimant attacking said timber culture entry, may be made available in the absence of an adverse claim. And this forms the distinguishing feature between this case and that of *McCall v. Molnar* (*supra*).

In this case as already stated, Cameron's actual residence on the land covered a period exceeding five years next preceding the date of final proof. His improvements were valuable and extensive, his good faith at that time was manifest, and there was then no adverse claim. The purpose of the law had been accomplished. The bare technical objection to his final proof should not be allowed to defeat the manifest object and purpose of the law. His proof was sufficient and is hereby approved.

It has been decided that Cameron's final proof was properly received and accepted by the local office May 28, 1883. His final certificate received at that time was therefore legally and properly issued. Having complied with all the requirements of the law in good faith, and having received final certificate, Cameron could mortgage his land, and could transfer it, under the rule in *Myers v. Croft* (13 Wall., 72). It has been found as a fact that he did so mortgage this land, did transfer about ten acres of it by warranty deed, and did give quit claim deed to his wife of all his interest in and to the same. Such a deed has been held valid in Dakota. *Hatch v. VanDoren* (4 L. D., 355), and *Power v. Barnes* (*id.*, 432).

It is thus observed that long prior to the time when Cameron filed the relinquishment of his claim in the local office, he had parted with all interest that he ever had in and to the tract attempted by him to be relinquished.

The land department will take notice of the rights of subsequent purchasers and mortgagees in good faith after the issuance of final certificate to the original entryman where notice of such mortgage or transfer is brought home to it. And the right of said third parties to appear and protect their interests by showing a proper compliance with the law on the part of the entryman is uniformly recognized.

The pretended relinquishment of Cameron is therefore found to be null and void, because he had nothing then to relinquish. The subsequent entry of Falconer can exist in law only upon the theory that Cameron's entry was removed before Falconer's entry was made; and inasmuch as it has been found that Cameron's entry was never legally removed from the tract it must necessarily follow that Falconer's entry has no basis upon which to stand, and that without regard to the question of fraud urged against it by the other parties in this case.

For the foregoing reasons the decision appealed from is affirmed.

OFFERED LAND—RESTORATION NOTICE—PRIVATE ENTRY.

ALBERT HIRSCH.

On the cancellation of an entry covering offered land, private cash entry of the tract should not be allowed prior to restoration notice; but a cash entry permitted without such notice is not void, but voidable, and, in the absence of an adverse claim may be sent to the Board of Equitable Adjudication.

Secretary Vilas to Acting Commissioner Stockslager, February 4, 1888.

In the case of Albert Hirsch, involving the validity of his private cash entry for the NE. $\frac{1}{4}$, Sec. 24, T. 32 N., R. 1 W., Shasta, California land district, appealed from the decision of your office, dated November 24, 1885, the following are the essential facts:

Said tract was offered at public auction June 3, 1861, and not being sold was subject to private cash entry from that time till November 3, 1884, at which time John Knapp entered the same under the homestead law. Nine months afterwards—to wit, August 3, 1885, said entry was canceled, and thereupon Hirsch made private cash entry of the same. Hirsch, in a corroborated affidavit, swears that he is a poor man, dependent on his daily labor, a German by birth and entirely ignorant of the regulations governing the Department in land matters; that on inquiry at the land office in regard to said land, he was informed by the local officers, that it was subject to private entry, and that relying on the correctness of this information, and believing that the register and receiver knew the law, he in good faith purchased the same from the government for the sum of two hundred dollars in gold, and received his final certificate; that he has since that time made improvements on said tract of the value of over two hundred dollars, consisting of a house twelve by twenty feet, of good first class lumber, a well thirty-six feet deep, about five acres cleared and one acre fenced and ready to plow; that he has exhausted his homestead right, and that he cannot

make pre-emption filing because he cannot leave his homestead to make a residence on said land.

In view of these facts, and the peculiar circumstances of hardship in his case, appellant thinks that in equity and justice his entry should not be canceled, and asks that it be permitted to stand, and "for such other and further relief in the premises as to justice and equity may seem meet and proper."

It appears from the foregoing, that the appellant contracted with the government to take this tract of land at one dollar and a quarter per acre, paid the government the stipulated price, obtained his final certificate, made valuable improvements, and that when his final certificate was presented and a patent demanded in accordance with its terms, he was informed that he could not have a patent for the land, and that his entry must be canceled. To justify this an imperative reason should be given, because the government is under a moral obligation to preserve good faith with its most humble citizen. The reason given in this case is that the entry is invalid, it being held by your office, that said land having been temporarily withdrawn from market, by the homestead entry aforesaid, was not subject to private cash entry.

It has been the practice of the Department to require a restoration notice in such cases of temporary withdrawal before the land again becomes subject to private cash entry, and in some cases a re-offering at public auction may be required. In this case there has been no restoration notice, and no re-offering, and each of these may be regarded as by your office as essential to the validity of the entry. That the local land office erred in permitting the entry to be made, at the time and under the circumstances it was made, there can be little doubt. This error may make the entry voidable, but it does not make it absolutely void, nor necessarily prevent the Department from issuing a patent thereunder.

There does not appear to be any conflicting claim to this land, and to cancel the entry, in view of the facts and circumstances detailed, would certainly inflict hardship on the appellant, and the law does not require this to be done as the case is clearly one falling within the jurisdiction of the Board of Equitable Adjudication. Rule eleventh of the rules established to govern you in submitting cases to said board is as follows:

All private sales of tracts which have not been previously offered at public sale, but where the entry appears to have been permitted by the local officers under the impression that the land was liable to private entry, and there is no reason to presume fraud, or to believe that the purchase was made otherwise than in good faith.

The papers accompanying your letter of transmittal are herewith returned for the purpose of having the case submitted to the Board of Equitable Adjudication. The decision of your office is so far modified as to conform to this direction.

*RAILROAD GRANT—CONFLICTING SETTLEMENT CLAIM.**ALLEN v. NORTHERN PAC. R. R. CO.*

The settlement right of a pre-emptor existing at date of definite location excepts the land covered thereby from the operation of the grant, although at such date the pre-emptor had failed to make proof and payment within the statutory period. It is therefore held that where a tract of land is embraced within an expired filing at definite location, that such land should not be awarded to the company under its grant, without a hearing to ascertain whether in fact the pre-emptor had, at such time, abandoned his claim.

Secretary Vilas to Acting Commissioner Stockslager, February 4, 1888.

The land involved in this case is the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, and the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 29, T. 13 N., R. 39 W., Fergus Falls, Minnesota, and is within the primary limits of the grant to the Northern Pacific Railroad Company, as shown by maps of general route and definite location filed respectively August 13, 1870, and November 21, 1871.

The section above specified was offered at public sale October 27, 1864, in accordance with proclamation No. 702, dated July 7, 1864.

May 18, 1870, Constantine Fittlar filed pre-emption declaratory statement No. 195, offered series, for said land alleging settlement the 16th of that month.

September 29, 1883, the railroad company listed this land as a portion of the land enuring to it under its grant, and such listing remains of record.

August 20, 1885, John H. Allen applied to purchase said tracts at private cash entry. His application was rejected by the local officers, and their action was approved by you November 24, 1885, because the lands had been listed by the railroad company as aforesaid. By the same decision you then rejected the claim of the railroad company, holding that said tracts were excepted from its grant by reason of the expired pre-emption filing of record when said grant became effective. From this decision both Allen and the company appealed, and the case has been considered.

The land in this case having been offered lands, the pre-emptor, Fittlar, was required to make proof and payment within twelve months from date of settlement, *i. e.* on or before May 16, 1871, over six months prior to the definite location of the road, otherwise the tract became subject to the entry of any other purchaser. Section 2264 U. S., Revised Statutes.

This he failed to do, nor has he ever been heard of in connection with this land since so far as the record before me discloses.

This case is in many respects identical with the case of James Schetka *v.* Northern Pacific Railroad Company, decided here March 12, 1887, (5 L. D. 473). In that case as in this, the lands had been offered in 1864, and had been filed upon by a pre-emptor in 1870, whose filing had lapsed

prior to the definite location of the road. The only difference between the cases is that in that case the present applicant for the land alleged that the original pre-emption claimant continued to hold the land as a pre-emption claim at the date of the definite location of the road. In this case there is no such allegation. It was ruled in the Schetka case that if the allegations of the present claimant were true, the land would not pass to the railroad company under its grant; but that if such allegations were not true, the land should be awarded to the railroad company upon the record as then made up. The failure on the part of Allen to allege the existence of Fittlar's settlement at the date of definite location of the road should not defeat the rights of the government if such settlement actually existed.

Aside from the filing of record there has been no showing made by any one tending to establish the status of the land at the date of definite location of the road. Under the ruling in the case cited the mere fact that the pre-emptor's filing had lapsed is not sufficient evidence of the abandonment of his claim. The company when it listed the land was not called upon to show that the claim of Fittlar was not in existence at the date of definite location of the road, and an opportunity will now be given it to make such showing.

You will accordingly direct the local officers to order a hearing, citing thereto the parties in interest, to determine the status of the land involved at the date of the definite location of the road. If the land was at that date free from the settlement claim of Fittlar, aforesaid, I see no reason from the present record why the railroad company should not get the land.

Pending the determination of the question thus raised, the application of Allen will remain suspended.

The decision appealed from is modified in accordance with the foregoing.

PRE-EMPTION—SETTLEMENT—AGENT.

BYER v. BURRILL.

No one can acquire a settlement right on public land by virtue of acts performed through an agent.

Secretary Vilas to Acting Commissioner Stockslager, February 7, 1888.

I have considered the appeal of Lemuel Burrill, from your decision holding for cancellation his declaratory statement made Nov. 10, 1882, for the NW. $\frac{1}{4}$ of section 15, township 130 N., range 63 w., Fargo, Dakota.

The facts found by the local land officers do not warrant their recommendation that the final proof offered by Burrill be accepted. They base their opinion upon the case of Lansdale v. Daniels, (10 Otto 113)

which they erroneously believe to be applicable to the case at bar. In that case there is no question as to settlement; in this case the question is whether settlement can be made by agent, and the rule is that no one can acquire a settlement right to public land by virtue of another's acts. *McLean v. Foster* (2 L. D., 175).

The defendant's declaratory statement No. 11,769 will stand subject to the plaintiff's homestead entry.

As modified, your decision is affirmed.

INDEMNITY WITHDRAWAL; PRIVATE CASH ENTRY.

JULIUS A. BARNES.

If there is no statutory denial of authority to withdraw lands in aid of a congressional grant, either in the grant itself or other statutes, the exercise of such authority by the Executive reserves the land so withdrawn, though the withdrawal may not have been contemplated by the grant.

A withdrawal of lands operating to reserve the same from pre-emption, would, in the absence of express statutory declaration to the contrary, also reserve such lands from private cash entry.

As land under reservation is not subject to private cash entry, an application to purchase lands in that condition confers no rights, nor can any rights thereafter be acquired through such application by reason of the changed status of the land. The withdrawal of offered lands in aid of a railroad grant abrogates the original offering, and on the revocation of such withdrawal the lands are restored to the public domain free of their previous offered condition, and hence not subject to private cash entry.

Secretary Vilas to Acting Commissioner Stockslager, February 6, 1888.

On November 16, 1885, Julius A. Barnes made application to purchase at private cash entry certain odd sections of land lying within the indemnity limits of the grant to the State of Michigan to aid in the construction of a road from Marquette to Ontonagon, tendering at the same time the purchase money for said land.

The local officers rejected said application for the reason that the lands applied for are odd numbered sections within the twenty mile limit of said grant as amended by act of March 3, 1865. (13 Stat., 520.)

You affirmed the action of the local office, rejecting said application by letter of December 13, 1886, from which decision the applicant appealed, alleging that "It was error to hold that the withdrawals of land in the indemnity limits of M. H. & O. R. R. operated as a prohibition of private cash entries within such limits under the public land laws".

The question presented by this assignment of error, is whether the President either by his own hand or acting through the proper executive department, has the power, in the absence of express statutory authority, to withdraw from private cash entry lands within the indemnity limits of a railroad grant that had once been offered at public sale.

From an examination of the cases in which this question has been either directly or indirectly adjudicated, the rule may be fairly deduced, that in all cases of grants of land to aid in the construction of railroads where there is no statutory denial of the right to withdraw lands for the benefit of said roads, either by the grant itself or by other statutory enactments, the exercise of such right by the executive would have the effect to reserve the lands so withdrawn for the purposes of the grant, although such withdrawal might not have been contemplated by the grant.

This principle was directly ruled in the case of *Riley v. Wells*, not reported but cited in *Wolsey v. Chapman* (101 U. S., 755) and reaffirmed in the last named case.

It is, however, contended by counsel for applicant that the ruling of the court in the case of *Wolsey v. Chapman*, and other kindred cases, is not decisive of the issue here presented, because said decisions only held that the rights of the respective parties depended upon the particular statute under which they claimed, and that as they claimed under the pre-emption law, the reservation in those cases was sufficient to defeat the right of pre-emption entry, as section 2258 R. S., provides that:

The following classes of lands, unless otherwise specially provided for by law, shall not be subject to the rights of pre-emption, to wit:

Lands included in any reservation by any treaty, law or proclamation of the President, for any purpose.

They insist that the rulings of the court in the cases above referred to, does not apply to lands subject to private cash entry at the date of withdrawal, because the statutory declaration (Sec. 2357, R. S.,) that all lands remaining unsold after the public offering *shall be subject to private entry*, is a denial of the right to make a withdrawal of such lands from private entry in the absence of some general law, or of express authority conferred by the grant.

The ruling of the court in the case of *Wolcott v. Des Moines Co.* (5 Wall., 681) and in other cases involving the identical question, was not predicated upon the exception in the statute as to pre-emption entries, but, on the contrary it was distinctly held, that the power of the executive department to withdraw lands for the benefit of the grant did not rest upon any express statutory provision requiring, or authorizing it, but upon the general authority in the land department to make such withdrawals from sale either by public or private entry.

The grant to the Territory of Iowa to improve the navigation of the Des Moines River of August 8, 1846, made no provision for the withdrawal of lands, but they were withdrawn by executive authority. It was contended that these lands were not reserved by competent authority, and hence that the reservation was nugatory, but the court in the case of *Wolcott v. Des Moines Co.*—supra (page 688) said:

Besides, if this power was not competent, which we think it was ever since the establishment of the Land Department, and which has been

exercised down to the present time, the grant of 8th August, 1846, carried along with it, by necessary implication, not only the power, but the duty, of the Land Office to reserve from sale the lands embraced in the grant. Otherwise its object might be utterly defeated. Hence, immediately upon a grant being made by Congress for any of these public purposes to a State, notice is given by the commissioner of the land office to the registers and receivers to stop all sales, either *public* or by *private entry*.

The question as to the validity of this withdrawal again came before the court at the December term 1869, in the case of *Riley v. Wells* (not reported), and again in the case of *Woolsey v. Chapman* (101 U. S., 755) wherein the court, citing the case of *Riley v. Wells* say:

The proper executive department of the government had determined that, because of doubts about the extent and operation of that act, nothing should be done to impair the rights of the State above the Raccoon Fork until the differences were settled, either by Congress or judicial decision. For that purpose an authoritative order was issued, directing the local land-officers to withhold all the disputed lands from sale. This withdrew the lands *from private entry*, and, as we held in *Riley v. Wells*, was sufficient to defeat a settlement for the purpose of pre-emption while the order was in force, notwithstanding it was afterwards found that the law, by reason of which this action was taken, did not contemplate such a withdrawal.

As said by the court in the case of *Clemens v. Warner* (24 How., 394):

By the act of 1841, the pre-emption privilege in favor of actual settlers was extended over all the public lands of the United States that were fitted for agricultural purposes and prepared for market. Later statutes enlarged the privilege so as to embrace lands not subject to sale or entry, and clearly evinced that the actual settler is the most favored of the entire class of purchasers.

It must therefore follow as a necessary conclusion, that a withdrawal of lands operating to reserve said lands from pre-emption entry, must, in the absence of an express statutory declaration to the contrary, also reserve said lands from private cash entry; the pre-emption privilege being a more favored right of purchase. Section 2258, R. S. providing that land reserved by the President for any purpose, shall not be subject to the right of pre-emption, while restricting or limiting the right of pre-emption, cannot be so construed as to enlarge the right of private cash entry by making it a more favored right of purchase than by pre-emption.

From the authorities above cited I am satisfied that in the absence of any statutory denial of the right to withdraw lands within indemnity limits for the benefit of a road, the exercise of such right by the land department would have the effect to reserve such lands for that purpose, even although it might not have been contemplated by the grant, and that such right is now too well established to be called in question. See also 8 Op., Atty. Gen., 246; 16 Op., 87, and opinion of Attorney General Garland in *Northern Pacific R. R. v. Miller*, March 14, 1887.

In the arguments of the case counsel relied also upon the further grounds: (1) That the lands included within the fifteen mile limits were formally restored to private cash entry in 1860 and were not included in the subsequent withdrawals of 1865 and 1871, and (2) That as all of the withdrawals of lands in indemnity limits for the benefit of said road were revoked by the Secretary's order of August 15, 1887, and the lands restored to settlement, they are now subject to private cash entry upon the pending application, as the Secretary has no power to make a restoration of lands with a limitation providing for their disposition under one law to the exclusion of another.

As argument was submitted in this case in connection with the private cash applications of Cassius M. Barnes, No. 1040, Lucien J. Barnes, No. 1027; Julia M. Barnes and Fred A. Fish, No. 1028; and Julius A. and Mary L. Barnes, No. 1039, involving the status of lands within the fifteen mile indemnity limits, as well as of lands between the fifteen mile and twenty mile indemnity limits, every question presented by the brief will be considered in this case, although the lands involved in this case are between the fifteen and twenty mile limits only.

The act of June 3, 1856 (11 Stat., 21) granted to the State of Michigan to aid in the construction of this road, alternate sections designated by odd numbers within the limit of six miles on each side of the road, with a limit of fifteen miles within which to select indemnity for deficits. The act of March 3, 1865 (13 Stat., 520) extended the indemnity limits to twenty miles. The State was not required in the first grant to select odd sections as indemnity but only alternate sections.

It is alleged by counsel for applicant that, the lands within the fifteen mile limits were formally restored to private cash entry in 1860, and were not included in the withdrawal of 1865 and 1871, or any subsequent withdrawal of lands for the benefit of the road.

The records of the land office show that these lands were subject to private cash entry prior to May 1856, at the minimum price. In May 1856 all the lands within the six and fifteen mile limits were withdrawn from sale and location for the benefit of said road.

April 10, 1860, the Commissioner of the General Land Office issued the following notice of the restoration of certain lands to market in the State of Michigan.

Notice is hereby given that all the vacant offered lands which lie outside of six miles on each side of the railroads, "from Little Bay de Noquet to Marquette, and thence to Ontonagon, and from the two last-named places to the Wisconsin State line," situated in the under-mentioned townships, which have not been selected in virtue of said grant, or reserved for any purpose whatever, and which were subject to private entry at the date of withdrawal at the ordinary minimum of \$1.25 per acre, or at the graduated prices under the act of August 4, 1854, will be restored to private entry on the days and at the places herein-after specified, at the ordinary minimum of \$1.25 per acre, or at the prices to which they may have graduated at the date of withdrawal.

This is the order referred to by applicant as formally restoring to private cash entry the lands between the six and fifteen mile limits.

While it may appear upon the face of the order that it was intended to restore to private cash entry all the lands within said limits, whether odd or even sections, yet to properly understand the effect and purport of the order, reference to the then existing practice of the land office is necessary, which shows beyond all doubt that it was not the intention of the order to restore to cash entry the odd sections, and this construction was acted upon by the local officers.

The practice of the land office prior to 1864 in the adjustment of railroad grants was, upon the passage of the granting act, to withdraw from market all lands, in both odd and even sections, within the region of country through which the proposed road was to run, until the State determined whether the alternate odd or alternate even numbered sections should be selected. Upon the definite location of the road, and such determination regarding selections, the reserved alternate sections within the granted limits not claimed for selection were proclaimed and offered at the double minimum price and at the same time a formal order was issued restoring to market all the lands outside the granted limits which had not been selected under the grant. This order of restoration was then followed by a letter to the local officers to the effect that as the odd or even sections (as the case might be), outside the granted and within the indemnity limits had been selected by the agent of the State in lieu of the lands disposed of by the United States within the granted limits such sections would not be restored but would continue to be reserved from any disposition whatever.

The word selection as it appears in such letters was not used in the sense in which it is now understood, *i. e.*, as importing a selection of specific tracts, but rather as an *election* between two different classes.

The earlier railroad grants did not designate the sections from which indemnity was to be taken, but merely limited it to the alternate sections to be selected by the State.

The practice of the office under these grants, prior to the passage of the act of July 1, 1864, (13 Stat., 335) was to require the State to elect whether it would take its indemnity from the odd or the even sections, and this election it called a selection. The State having made her election the particular tracts to be approved as indemnity were selected and listed by this office without any assistance from the officers of the State, and no other selection was required.

Acting under this rule, the State, prior to the issuance of the order of April 10, 1860, elected to select indemnity from the odd sections without making any actual selections of specific sections, and the order was therefore intended to restore to private cash entry only the even sections within said limits, the department recognizing that the State had selected all of said odd sections from which to make final selection to supply the deficiency.

In confirmation of this view the Commissioner on the 27th of the same month, being prior to the date that said order of April 10, was to take effect, addressed the following letter to the register and receiver of the Marquette land office :

For your guidance in disposing of the public lands, I enclose herewith, a diagram of the district of lands subject to sale at your office, showing the lines of route and of the six and fifteen miles limits of the railroads, through the same, to aid in the construction of which a grant of lands was made to the State of Michigan by act of Congress, approved June 3, 1856. As all the vacant tracts in the odd numbered section, out side of the six and within the fifteen mile limits, have been selected by the agent of the State in lieu of the lands disposed of in the sections granted by the above mentioned act, such tracts are not restored to market by notice No. 658, and you will of course continue to reserve them from sale or location as heretofore for any purpose whatever.

After the act of 1865 extending the indemnity limits to twenty miles, the Commissioner of the General Land Office made a second withdrawal for the benefit of said road.

In addressing the register and receiver upon this subject he said :

Herewith enclosed I transmit a diagram of the Marquette and Ontonagon Railroad, showing the six, fifteen and twenty mile limits of the same and, as directed by the Secretary of the Interior, you are hereby instructed to withdraw—upon the receipt of this letter—from sale, location, or claim the vacant odd numbered sections and parts of sections between the fifteen and twenty mile limits of said road until further orders from this office.

It is contended that the Commissioner in this letter only withdrew the lands between the fifteen and twenty mile limits and did not include the lands between the six and fifteen mile limits, which, as they allege had been formally restored to private cash entry in 1860.

But the odd sections between the six and fifteen mile limits were not restored by the order of April 10, 1860, and hence there was no necessity for referring to those lands in the order of 1865, withdrawing lands within the twenty mile limits, or the order of 1871, which continued in force the order of 1865. These several acts of withdrawal were always considered by the land department as withdrawing and holding in reservation for the benefit of said road the odd sections embraced within both the fifteen and twenty mile limits, from the date of said withdrawals until the order of revocation of August 15, 1887, and the local officers have considered this to be the status of the land, and have acted upon it although lands within the fifteen mile limit have through inadvertence been sold at private cash entry and passed to patent.

It can make no difference whether the company made actual selection of specific tracts or sections, or merely elected to have the odd sections held in reservation for the purpose of making selections therefrom, so far as it affects the validity of the withdrawal.

It is sufficient that the withdrawal was made for that purpose, and there being no statutory denial of the right to withdraw said lands for

the benefit of the road, the exercise of that right by the Commissioner had the effect to reserve these lands for that purpose, even, although it might not have been contemplated by Congress in making the grant.

It being shown that the lands embraced within both the fifteen and the twenty mile limits were withdrawn under proper authority, and remained in such reservation until the order of August 15, 1887, the questions then arises, are the lands subject to private cash entry upon the pending applications made while they were in a state of reservation, by reason of the public offering of said land prior to May 1856, without a second offering ?

These lands were not subject to private cash entry while they were in a state of reservation, and hence the applicant can acquire no right under an application made when the lands were not in a condition to be purchased. Hence there was no error in your decision, and no right can be thereafter acquired under said application by reason of the changed status of the land. Besides—"to allow them to be entered by any particular individual, before public notice has been given that they are subject to private entry, would, in most cases, give to such individual a preference over the rest of the community", (3 Op., Atty. Gen., 276) which would in itself be a sufficient reason for affirming your decision and rejecting the application.

But it is urged that these lands are now subject to private cash entry upon another application, by reason of being offered lands at the minimum price prior to withdrawal.

The withdrawals of these lands from market abrogated the original offering and the restoration of them to the public domain by the order of August 15, 1887, did not restore them as offered lands, but as lands that had practically never been offered. The fundamental principle governing the disposition of lands by cash entry, is as said by the supreme court in the case of *Eldred v. Sexton* (19 Wall., 189), "to secure to all persons a fair and equal opportunity of purchasing them, and to obtain for the government the benefit of competition in case the lands should be worth more than the price fixed by Congress".

In that case the lands had been offered at the enhanced price of \$2.50 per acre. Subsequently a joint resolution of Congress provided for a re-location of the road, which placed the sections in controversy outside of the original limits and declared that said lands should be thereafter sold at \$1.25 per acre. The court held that they were not subject to private cash entry at the minimum price until after an offering at that price, because the condition as to price had been changed, and there had been no opportunity for competition at the reduced price. The court say :

When they were withdrawn from the operation of this legislation and their exceptional status terminated, the general provisions of the land system attached to them, and they could not, therefore, be sold at private entry, until all persons had the opportunity of bidding for them at public auction.

It seems to me that this reason applies with greater force where lands having been once offered are held in reservation for a long period of time, during which their value is greatly enhanced, by reason of vast improvements largely due to governmental aid and for the benefit of which such withdrawal was made. Keeping in view the fundamental principle underlying the land system in regard to private entries I can see no reason why these lands should be subject to private entry at the minimum price until "all persons have had a fair and equal opportunity of purchasing them" and why the government should not "have the benefit of competition in case the lands should be worth more than the price fixed by Congress."

The second ground contended for by applicants is that as all the withdrawals of lands in indemnity limits for the benefit of said road were revoked by the Secretary's order of August 15, 1887, and the lands restored to settlement, they are now subject to private cash entry upon the pending application as the Secretary has no power to make a restoration of lands with a limitation providing for their disposition under one law to the exclusion of another.

If it be assumed for the sake of argument—and no admission of the point is here otherwise made—that a revocation of a withdrawal of public lands for the purpose of opening them to settlement under the general land laws, operates to restore them to the public domain, and without the express authority of Congress providing for a limitation, that they would, by the revocation of such withdrawal, become subject to disposition under the general land laws, the consequence is not favorable to the applicants, for the reason that, although the revocation of the withdrawal be taken to have operated to restore these lands to the public domain, subject to disposition under the general land laws, it does not follow that they are therefore subject to private cash entry; because the public offering of lands is a condition precedent to the authority of the officers of the land department to dispose of them at private cash entry; and until that condition has been performed, they are not subject to disposition in that manner, although the Secretary would unquestionably have the power to re-offer them at public sale, and by such re-offering, subject those remaining unsold to private cash entry.

In this view of the question no modification of the order of August 15, 1887, directing that these lands "be restored to the public domain, and opened to settlement under the general land laws" is necessary to be considered in the decision of this appeal as that order neither forbids nor admits in terms the purchase of these lands at private cash entry.

In support of their position counsel refer to the decision of *Pecard v. Camens* (4 L. D., 152) to show that a re-advertisement is not necessary in restoring lands to private entry after a temporary withdrawal.

In the case of *Pecard v. Camens* the lands had always been offered and had not been withdrawn from market after the increase in price; be-

sides the entry had been allowed in that case, and although it was held to have been improperly allowed it was considered not to be void but voidable only and that the defect might be cured by a reference to the Board of Equitable Adjudication. It was upon these grounds that the department distinguished that case from the case of *Eldred v. Sexton*.

As to whether these lands should now be offered at public sale is a question of administration not necessary to be determined in the decision of this case.

The decision of your office is affirmed.

THE STATE OF CALIFORNIA.

Motion for review of departmental decision rendered December 12, 1887 (6 L. D., 403) overruled by Acting Secretary Muldrow, February 9, 1888.

PRACTICE—SECOND CONTEST—AFFIDAVIT OF CONTEST.

EDDY v. ENGLAND.

An allegation as to the existence and continuance of default is sufficient, if such default is alleged to exist at the time the affidavit of contest is made.

An affidavit of contest, filed pending the disposition of a prior contest, should be received and held without further action, until final disposition of the prior suit; but the right of the second contestant will be held to take effect by relation as of the date when his contest affidavit was filed.

The right of a second contestant cannot be defeated by curing the default charged after his contest is filed, and pending the disposition of a prior fraudulent and collusive contest.

Acting Secretary Muldrow to Acting Commissioner Stockslager, February 9, 1888.

I have considered the appeal of Henry L. England from your office decision of January 18, 1886, holding for cancellation his timber culture entry for the NW. $\frac{1}{4}$ of section 25, township 108 N., range 66 W., Mitchell, Dakota.

Henry L. England entered this land under the timber culture act of June 14, 1878, on the 8th day of September, 1882.

September 9, 1884, Joseph R. Eddy made affidavit of contest alleging that the claimant "has failed to break five acres either the first or second year according to law." This affidavit was sent by mail to the local office and received there the same day. The local officers declined to receive this affidavit of contest for the reason that before its presentation but on the same day, Henry Bennett had filed a contest against the same entry. Mr. Eddy's affidavit was, accordingly, returned to him. September 22, 1884, Eddy made and attached to his affidavit of contest

an affidavit charging that Bennett's contest was "a fraudulent and speculative contest and has been filed by the collusion and by the procurement of the said claimant Henry L. England for the purpose of holding said land without complying with the law relating to timber culture entries and with a view and purpose of preventing the affiant or any other person from making a legitimate contest to said land."

This affidavit and the contest affidavit were received and filed in the local office. Hearing of Bennett's contest was set for November 10, 1884, but on that day no one appeared to prosecute the case and it was dismissed and the contest of Eddy entered of record and notice of hearing issued for January 10, 1885, the testimony to be taken before O. W. McDonald, December 30, 1884. The parties appeared pursuant to notice and by consent the taking of testimony was adjourned to January 27, and the hearing to February 5, 1885. On the day to which adjournment was had both parties appeared by counsel. Testimony was taken and on February 18, 1885 the local land officers united in the opinion that the entry of England should be canceled. This opinion was sustained by your office on appeal.

Counsel for England appeals from your decision and alleges four grounds of error, viz:

1. In not finding from the affidavit of contest that the contestant had failed to allege that the default existed at the date the contest was received at the local office, and for that reason should have been dismissed.
2. In not finding that prior to the issuing of notice the defendant had cured any and all defects relative to his entry.
3. In finding evidence of fraud or collusion on the part of the defendant; and
4. In not dismissing the contest.

Determination of the two grounds of error first assigned depends upon the day when the contest was initiated. Eddy's affidavit of contest was made and presented to the local officers who refused to receive it September 9; again presented accompanied by an affidavit charging that Bennett's contest was a collusive one, September 22, and accepted by the local officers subject to the result of Bennett's contest; Bennett's contest failing by default November 10, the contest of Eddy was entered of record.

It is claimed by the defendant that the present contest must be considered as initiated November 10, after the prior one of Bennett had been dismissed, thus leaving two months between the making of the affidavit and the commencement of the case. If this contention be admitted then the affidavit of contest made September 9, may be insufficient because it fails to allege that the default existed November 10, upon which alleged insufficiency the attorney for the defendant based the motion made by him at the hearing and previous to the trial to dismiss the contest on the ground that no sufficient cause of action was alleged.

But it cannot be admitted. It is not within the power of the contestant to fix the date of a hearing nor can he know when the hearing will be had. All that he is required to allege is that the failure exists at the time the affidavit of contest is made. *Parker v. Castle* (4 L. D., 84); *Worthington v. Watson* (2 L. D., 301). This affidavit dates from the time it is received at the local office. *Hayes v. Gilliam* (11 C. L. O., 83).

The contention of the attorney for the defendant based upon the decision in the case of *Wheelan v. Taylor* (2 L. D., 295) that "a contest against a timber culture entry cannot be initiated pending a prior contest" cannot be sustained. It is the duty of the local officer to receive an affidavit of contest when another contest is pending and to hold it subject to the disposition of the first contest. *Durkee v. Teets* (3 L. D., 512); *idem* on review (4 L. D., 99); *Churchill v. Seeley et al.* (4 L. D., 589).

The affidavit of contest was made September 9, and duly presented to the local office and should have been received although no further action thereon could have been taken until the prior contest was disposed of, and it will be held to take effect from that date, the right of Eddy attaching the moment Bennett's contest was disposed of and relating back to the time when his contest affidavit was presented to the local officers so as to cut off any intervening claimant. *Melcher v. Clark* (4 L. D., 504); *William H. Cowen* (12 C. L. O., 178).

It is further claimed on behalf of the defendant that in as much as it was held in the case of *Houston v. Coyle* (2 L. D., 58) that: "It is by notice to the settler that jurisdiction is acquired and not by any affidavit on which citation was issued" and the notice not having been issued until November 10, no jurisdiction was acquired by the local office until that time when the default had been cured, and the affidavit of contest was, therefore, worthless. To so hold would be to point out an easy way of evading the law by the procurement of the entryman of a collusive contest. The right of Eddy to proceed and show cause why the entry should be canceled was suspended by the pendency of the prior contest of Bennett. When the contest of Bennett is shown to be a collusive one and is disposed of, Eddy became entitled to proceed with the contest and prove the truth of his allegations against the entry; his contest relates back to September 9, when the affidavit was presented to the local officers, and his right to prove failure by the entryman to comply with the law cannot be defeated by the latter's showing that during the pendency of the collusive contest he had cured his default. To so hold would be to allow the entryman the very advantage sought to be secured by the collusive contest.

That the contest was collusive is apparent from the fact that it was not prosecuted, that no defense was made to the charge made by Eddy that it was brought for the benefit of the entryman to bar the initiation of his bona fide contest, and by the fact that two days after it was filed

the entryman endeavored to cure his default, which he claims he succeeded in doing between September 17, and October 18.

No rights are acquired by fraudulent and speculative contests (*Van Ostrum v. Young* 6 L. D., 25) and none are defeated by them.

The allegations of the contest remain to be considered upon the testimony presented. About four acres were broken the first year, which were cultivated the second year, and about one acre was planted to tree seeds. The additional breaking which was done between September 9, and October 1, 1884, added to amount previously broken made a total of about ten and three-fourths acres, of which about eight acres were cross plowed.

The reason given for failing to comply with the law, viz: that it was too dry, that one of the horses composing his team was lame, and that he could not hire the work done are to a slight extent supported by the testimony, but none of them apply to the first year and do not constitute a sufficient excuse for failing to comply with the law the second year.

Your decision holding the entry for cancellation is affirmed.

MINING CLAIM—EFFECT OF ADVERSE PROCEEDINGS.

IRON SILVER MG. CO. v. MIKE & STARR MG. CO.

A motion to dismiss an application for patent will not be entertained prior to the disposition of adverse proceedings duly initiated and pending in the courts.

Secretary Vilas to Acting Commissioner Stockslager, February 9, 1888.

I have considered the case of the Iron Silver Mining Company *v.* the Mike and Starr Gold and Silver Mining Company, as presented by the appeal of the former from the decision of your office dated April 7, 1886, involving the Gardiner Lode claim, in which the action of the local land office was affirmed denying the appellant's motion to dismiss the application of the appellee company.

The record shows that the Mike and Starr Gold and Silver Mining Company filed its application for patent to the Gardiner Lode claim, on April 13, 1881, and made entry for the same on June 18, 1881.

Your office on July 7, 1882, held said entry for cancellation, because the claim was entirely within the limits of the Moyer Placer survey patented on January 30, 1880.

A motion for review was filed in your office and the same was denied for the reason that the land department had no jurisdiction over land that had been patented. On appeal the decision of your office was reversed by Secretary Teller (10 C. L. O., 150) holding, among other things, that the issuance of a patent on said placer claim did not prevent the Department from issuing a patent for a lode claim within the

exterior boundaries of a placer patented claim, if said lode claim was known to exist at the date of the application for patent; that in effect section 2333 R. S., carves out of a patent to a placer claim, all lodes known to exist at the date of the application for patent, together with twenty-five feet of surface ground on each side; that said application must be dismissed without prejudice to the claimant's right to proceed *de novo*.

This decision of Secretary Teller was based upon the departmental rulings in *Becker v. Sears* (1 L. D., 575-7); *War Dance v. Church Placer* (ibid 549); *Robinson v. Roydor* (ibid., 564).

As directed in said departmental decision, said application was dismissed, the entry canceled, and the said Mike and Starr Company filed a new application for its said claim on December 11, 1884. Due notice issued, and within the time required by law, the appellant company filed its claim adverse to said company, and at the same time filed a motion to dismiss said application.

On February 20, 1884, the appellant company commenced suit under section 2326 R. S. The motion to dismiss was overruled by the local land office on February 26, 1884 for the reason "that adverse suit has been filed within the statutory period, and the whole question can be settled in the suit brought in support thereof."

On appeal, your office affirmed the action of the local land office, for the reason, in part, that under said former departmental decision, it was the intention of the Secretary that the controversy between the parties should be settled by the courts rather than by a hearing at the local land office, and that, pending such suit, your office would not render any decision upon any question involved therein.

Section 2326, R. S., provides that :

Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived.

In the case at bar it appears that suit was commenced as provided in said statute, and until a final decision is rendered in said case, or the adverse claim is waived, it would seem that in the language of the statute all proceedings must be stayed in the case, except the publication of notice as provided in said section.

It will be quite unnecessary to pass upon the question of the effect of said patent upon said placer claim, for the appellant company has invoked the jurisdiction of the court in accordance with the provisions of said section and until said suit shall have been finally determined, no further action can be taken in the premises.

A careful examination of the whole record shows no good reason for disturbing the conclusion of your office, and said decision is accordingly affirmed.

RAILROAD GRANT—INDEMNITY—STATUTORY WITHDRAWAL.

ST. LOUIS IRON MT. & SOUTHERN RY. CO. *v.* VENABLE.

The statutory withdrawal provided for in the act of July 28, 1866, is limited to lands within the primary limits by the words "all lands mentioned in this act and hereby granted."

Lands within the indemnity limits of a grant, not withdrawn or selected, are subject to appropriation under the homestead law.

Secretary Vilas to Acting Commissioner Stockslager, February 14, 1888.

I have considered the case of the St. Louis, Iron Mountain and Southern Railway Company *v.* William F. Venable, on appeal by said company from your office decision of June 30, 1886, rejecting its claim to the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, and Lot 1, of the NE. $\frac{1}{4}$ of Sec. 1, T. 22 N., R. 3 E., Ironton, Missouri land district.

This land is within the indemnity limits of the grant of lands to the States of Arkansas and Missouri to aid in the construction of certain railroads in those States, by act of February 9, 1853 (10 Stat., 155), as revived and extended by act of July 28, 1866 (14 Stat., 338), and is claimed by the appellant company under the provisions of those acts.

Your decision holds that because of the provision in said act "that all lands mentioned in this act and hereby granted are hereby reserved from entry, pre-emption, or appropriation to any other purpose than herein contemplated for the said term of ten years from the passage of this act," the land in question although within the indemnity limits of said grant, was reserved for the period of ten years. I cannot concur with this conclusion. The expression "all lands mentioned in this act and hereby granted", limits the withdrawal to lands within the granted limits.

Joseph C. Inman made homestead entry for this tract April 11, 1868, which entry was canceled July 15, 1872. William F. Venable made homestead entry for the same land July 30, 1872, and made final proof thereon October 9, 1877, which proof was, by the local officers, approved and final certificate issued. The papers were sent to your office, but no action seems to have been taken in relation to the final proof.

These tracts not being within the withdrawal and not having been selected by the company at the time of Venable's entry, were at that time public lands subject to appropriation under the homestead laws, and hence that entry was properly allowed by the local officers. Under these circumstances it is not necessary to refer the entry to the Board of Equitable Adjudication, but it should be passed to patent if the proof is found by your office to be regular and sufficient.

Your said decision rejecting the claim of the railroad company is, for the reasons herein stated, affirmed, and the case returned to your office for appropriate action on Venable's final proof.

*DESERT LAND ENTRY—COMPACTNESS.***JOHN DURBIZE.**

Under the regulations of the Department a desert entry will not be allowed for a narrow strip of land, irregular in shape, lying along and upon both sides of a stream.

Secretary Vilas to Acting Commissioner Stockslager, February 15, 1888.

I have considered the appeal of John Durbize from your office decision of August 7, 1885, affirming the decision of the local officers rejecting Durbize's application to make desert land entry for the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 32, and the SW. $\frac{1}{4}$, and the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 33, T. 44 N., R. 93 W., and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 4, T. 43 N., R. 93 W., 6th P. M., Cheyenne land district, Wyoming.

This application was rejected by the local office "because the land embraced is not sufficiently compact in form."

A plat filed with the application shows that the land applied for lies along and upon both sides of a small stream marked as Kirby Creek, making an irregularly shaped tract one and a quarter miles in length and at no place more than half a mile in width. On the back of this plat is an affidavit executed by E. F. Stahle and N. J. Burnham, who describe themselves as United States deputy surveyors, and say that the hilly land comes down to the edge of the tracts applied for "so that land adjoining could not be taken to make a claim of prescribed shape for the reason that said adjoining land is too hilly to conduct water on it without great expense." The applicant himself evidently had no personal knowledge of the land, for he says in his application, "I became acquainted with said land by information received from E. F. Stahle, United States deputy surveyor."

In the rules and regulations in regard to desert land entries in force at the time this application was made, it is said, after providing that the land shall be as nearly in the form of a technical section as the situation of the land and its relation to other lands will admit. "But entries running along the margin or including both sides of streams, or being continuous merely in the sense of lying in a line so as to form a narrow strip or in any other way showing a gross departure from all reasonable requirements of compactness will not be admitted." The land here applied for is certainly within the inhibition of this rule and was therefore properly refused by the local officers. Your said office decision is therefore affirmed.

This case is one of seven now before the Department on appeal. The land included in these seven applications lies along and upon both sides of Kirby Creek for a distance of over eight miles, making a strip of land at no place more than half a mile in width. The applicants are citizens of San Francisco, and all the papers were executed on the same day at

that place. The applicants do not allege a personal knowledge of the land but state that they obtained information of the land from either E. F. Stable or J. L. McCoy, United States deputy surveyors. The witnesses in each instance are Fred C. Warner and M. F. Reilly, also deputy surveyors. The cases are analogous in all material particulars and will be ruled by the decision herein.

TOWNSHIP SURVEY—DEPOSIT SYSTEM.

LEO. P. BURER ET AL.

An application for the survey of a township under the deposit system, signed by all the applicants, is sufficient under the law and regulations; each settler not being required to sign a separate application.

The right to a survey under the deposit system does not rest in the discretion of the Commissioner, but is a matter of right in the settlers, whenever they have shown a full compliance with the law and regulations, and the township is within the range of the regular progress of public surveys.

Secretary Vilas to Acting Commissioner Stockslager, February 15, 1888.

Leo P. Burer and seven others, who allege themselves to be actual settlers upon lands in Lincoln county, New Mexico, claiming the same under the pre-emption and homestead laws of the United States, filed an application for a survey under the deposit system, of township 8 south, range 17 east, New Mexico.

In submitting this application to your office by letter of October 17, 1885, the surveyor general said :

I enclose herewith application of settlers for the survey of Tp. 8 S. R. 17 E. under the deposit system. I believe the application substantially conforms to your requirements in such cases, and I recommend that the survey be allowed on the grounds and for the reasons set forth and sworn to by the settlers in their application which I believe is made in good faith. I see no reason why their petition should not be granted; but I recommend the survey subject to your judgment as to the propriety of ordering it under your new rules confining the service to agricultural lands. As you will see by the papers the lands are not strictly of this character being only partially so at the most, but similar applications are coming and I think it best to submit the questions for your further consideration. It seems to me the way should be opened for the settlement and use under the pre-emption and homestead laws of lands fitted for pasture and grazing as well as actual tillage.

You rejected the application upon the following grounds: (1) That the same application is signed by all the settlers which is not admissible, although within the form prescribed by circular of June 24, 1885, but that each applicant must make a separate application specifically describing his improvements, and (2) That the land is not of the character of land which it is desirable at present to survey, being mountain and timber land and not especially adapted for agriculture.

The genuineness of the application seems also to be questioned, upon the ground that the names are all in the same handwriting, signified by the mark of the applicants, and attested before the same notary.

The surveyor general in submitting this application says "I recommend that the survey be allowed on the ground, and for the reasons set forth and sworn to by the settlers in their application, which I believe is made in good faith". I see nothing in the record to cast discredit upon this application or any reason to differ from the opinion of the surveyor general that it was sworn to by the applicants and was made in good faith.

Section 2, of the circular of June 24, 1885 (3 L. D., 599) provides that:

As applications must be made by "the settlers" in the township, the body of such settlers must join in the application. There must also be a sufficient number of settlers to show good faith, and to indicate that the survey is honestly desired for the benefit of existing actual settlements as contemplated by the law.

The several applicants joined in an application alleging under oath that they are actual settlers, claiming said lands under the homestead and pre-emption laws, and the surveyor general finds that the application was made good in faith. It is therefore strictly in accordance with the letter and spirit of said circular. See also case of G. W. Baker (4 L. D., 451).

The law governing the survey of townships under the deposit system is embraced in sections 2401 and 2402 R. S., as follows:

When the settlers in any township, not mineral or reserved by government, desire a survey made of the same, under the authority of the surveyor-general, and file an application therefor in writing, and deposit in a proper United States depository, to the credit of the United States, a sum sufficient to pay for such survey, together with all expenses incident thereto, without cost or claim for indemnity on the United States, it may be lawful for the surveyor-general, under such instructions as may be given him by the Commissioner of the General Land Office, and in accordance with law, to survey such township and make return thereof to the general and proper local land office, provided the township so proposed to be surveyed is within the range of the regular progress of the public surveys embraced by existing standard lines or bases for the township and sub-divisional surveys.

The deposit of money in a proper United States depository under the provisions of the preceding section, shall be deemed an appropriation of the sums so deposited for the objects contemplated by that section, and the Secretary of the Treasury is authorized to cause the sums so deposited to be placed to the credit of the proper appropriations for the surveying service; but any excesses in such sums over and above the actual cost of the surveys, comprising all expenses incident thereto, for which they were severally deposited, shall be repaid to the depositors respectively.

The right to have the survey made of a township under the deposit system does not rest in the discretion of the Commissioner, but is a matter of right in the settlers whenever they have shown a full compli-

ance with the law and the regulations of the department governing such surveys, "provided the township so proposed to be surveyed is within the range of the regular progress of the public surveys embraced by existing standard lines or bases, for the township and sub-divisional surveys".

If it is satisfactorily shown that the applicants are actual settlers on lands in any township not mineral or reserved by the government claiming the same under the settlements laws of the United States, and the township is within the range of the regular progress of public surveys, the survey should be ordered as a matter of right; but if any of these facts are not satisfactorily shown, or the *bona fides* of the application is impeached it should be rejected.

Seeing no reason why the recommendation of the surveyor general should not be approved, I reverse the decision of your office, and direct that the survey be ordered.

OSAGE TRUST LANDS—QUALIFICATIONS OF PURCHASER.

WENIE *v.* FROST.

The provisions of the act of May 28, 1880, with respect to the qualifications required of a purchaser of Osage land, were not repealed by the act of December 15, 1880, providing for the disposal of a part of Fort Dodge military reservation.

Secretary Vilas to Acting Commissioner Stockslager, February 15, 1888.

I have considered the petition filed in behalf of Frost for review of departmental decision dated October 5, 1887, (6 L. D., 175), in the case of Frederick T. M. Wenie *v.* Daniel M. Frost involving a tract of land which forms a part of the Osage Indian trust and diminished reserve lands in Kansas, included in what was for a time the Fort Dodge military reservation. The tract in question is described as follows: Lots 9, 10, 11 and 12, in Sec. 25, T. 26 S., R. 25 W., and Lots 14 and 15 in Sec. 30, T. 26 S., R. 24 W., Garden City land district, Kansas.

The history of this case is fully set out in the decision a review of which is sought and need not here be repeated.

That decision directed the cancellation of Frost's entry for the reason that he had not at the date of his entry the qualification of a pre-emptor as required by the act of May 28, 1880 (21 Stat., 143), providing for the disposal of the Osage trust and diminished reserve lands in Kansas.

It is contended in the motion for review that the act of December 15, 1880 (21 Stat., 311), which is quoted in the decision sought to be reviewed, and need not here be reproduced, operated to repeal the act of May 28, 1880, in so far at least as the last named made it necessary that the settler should have the qualifications of a pre-emptor; that to hold

otherwise would be to nullify the later act by the provisions of the earlier.

In the decision, a review of which is asked, is found the following language:

However we may construe the act of December 15, 1880, with reference to the disposal of the greater part of the reservation relinquished by said act, lying north of the Osage lands, it should not be so construed as to impair or defeat the rights of the Indians guaranteed by the treaty of 1865, (14 Stat., 687).

The establishment of the reservation upon these lands in 1868 did not change or defeat the trust, but simply postponed the execution of it, and whereby the act of 1880 a portion of these lands were released from said reservation, they immediately became subject to disposal in the manner and under existing laws and regulations providing for the disposal of said lands.

It is to be noted that the act of May 28, 1880, had reference solely to the Osage trust and diminished reserve lands in Kansas, and Congress clearly having in view the obligations imposed by the treaty of 1865, provided for the disposal of said lands for cash, the net proceeds to "be deposited to the credit of the proper Indian fund."

The act of December 15, 1880, is an act providing for the disposal of "a part of the Fort Dodge Military reservation to actual settlers under the provisions of the homestead laws, and for other purposes."

It is to be observed further that only a very small portion (about one twenty-fifth) of that part of the Fort Dodge military reservation within the boundaries named in the act of December 15, 1880, is Osage trust land, and that no mention is made in said act of Osage trust land.

I am satisfied that Congress by the act of December 15, 1880, had no intention of repealing the act of May 28, 1880, or any portion thereof, since such repeal would work an impairment of the rights guaranteed to the Indians by the treaty of 1865. Especially do I think this view is warranted in the absence of any express words of repeal, for had Congress intended a repeal the effect of which would be to disregard treaty obligations, or to defeat or impair treaty rights, I feel certain it would have expressed that intention in plain words and not left it to implication. How then is the act of December, 1880, in so far as it is in apparent conflict with the act of May 28, 1880 (which is as to less than three sections of land) to be construed?

Manifestly the intention of Congress can be ascertained only by consideration of the treaty of 1865, and the two acts above mentioned *in pari materia*, and so considering them I have no difficulty in arriving at the conclusion that the tract in question cannot legally be entered by Frost for the reason that having made one Osage entry he is not a qualified pre-emptor. But the motion for review cites the fact that the President in May, 1882, called the attention of Congress to what was regarded as a conflict between the treaty of 1865 and the act of December 15, 1880, and that he recommended action thereon. It is urged that

such recommendation is an additional and convincing evidence of real conflict between the treaty and the law, and that such conflict existing, the later law must prevail and work a repeal of preceding laws which are inconsistent with it. It is to be observed, however, that notwithstanding the President's recommendation looking to the preservation of treaty rights, and the strong expression of view by the Commissioner of Indian affairs in his letter of April 12, 1882 (made a part of the President's communication to Congress,) that to dispose of Osage trust lands under the homestead law "is a violation of a solemn treaty stipulation and acts of Congress passed in pursuance thereof," Congress declined to take any action.

From this fact the inference may, I think, be fairly drawn that Congress did not see in its past legislation such violation of treaty stipulation as had been suggested in the executive communication referred to, and therefore concluded that the legislation proposed was unnecessary.

Upon a full consideration of the motion for review and the argument made thereon, said motion is denied and the decision of October 5, 1887, is adhered to.

DESERT LAND ENTRY—MARRIED WOMAN—SETTLEMENT.

SELWAY v. FLYNN.

The desert land act does not prohibit entry thereunder by a married woman. A claim to land under the desert land law is initiated by the application to enter, and not by act of settlement.

Secretary Vilas to Acting Commissioner Stockslager, February 16, 1888.

I have considered the case of Alice A. Selway *v.* Thomas Flynn and A. F. Jones on appeal by Mrs. Selway from your office decision of February 16, 1886, rejecting her application to make desert entry for the S. $\frac{1}{2}$ and the NE. $\frac{1}{4}$ of Sec. 1, T. 85 N., R. 9 W., Helena, Montana land district.

This land was within the withdrawal limits of the Northern Pacific Railroad Company, but under a change in the location of the road fell outside those limits and was on August 1, 1883, restored to the public domain.

While the land was withdrawn, one Thomas Selway applied to the railroad company for the privilege of purchasing the same, and was notified that his application was filed and that he would, when the company was prepared to make contract for sale of the land, be given the first right of purchase therefor. Thereupon Selway enclosed a portion of the northeast quarter of said section and prepared it for cultivation.

About the first of June, 1883, after it was known this land would fall outside the limits of the railroad grant, Selway enclosed the land in controversy together with other land of his by a wire fence. On July 22,

1883, Selway conveyed by bill of sale to his wife, Alice A. Selway, "all the fencing I have" on the land in question.

On August 1, 1883, Thomas Flynn made desert entry for said land, viz: the S. $\frac{1}{2}$ and NE. $\frac{1}{4}$ of Sec. 1, T. 85 N., R. 9 W. On the same day Alice A. Selway applied to make desert entry for said land, which application was refused by the local officers because of Flynn's prior entry. On the same day one A. F. Jones filed declaratory statement for the SE. $\frac{1}{4}$ of said section, alleging settlement thereon July 26, 1883.

Mrs. Selway appealed from the decision rejecting her application to enter, and your office on March 3, 1884, ordered a hearing to be held to determine the rights of the parties. A hearing was held before the local officers May 31, 1884, the testimony having been previously taken before Robert T. Wing, probate judge of Beaver Head County, Montana, on May 19, 1884. Flynn had on January 1, 1884, offered final proof on his entry as to the S. $\frac{1}{2}$ of said section, and had relinquished all claim to the NE. $\frac{1}{4}$ thereof, all of which was taken into consideration upon the hearing before the local officers. The register and receiver decided that the testimony did not warrant them in disturbing Jones's pre-emption filing, and that Flynn's desert entry should be canceled and Mrs. Selway's application to enter allowed. On appeal by Flynn you affirmed their decision as to the pre-emption claim of Jones, and say as to the other part of the case:

I am of the opinion that the desert land act should be construed with reference to the relations and disqualifications of coverture at common law and as it forbids more than one entry of six hundred and forty acres by one person that it did not intend that a married man and woman should each be allowed an entry thereunder. I am aware that there have been decisions holding to the contrary, but with my views on the subject, I must decline to follow said precedents. I therefore sustain your original decision rejecting Mrs. Selway's application. The entry by Flynn may remain subject to the right of Jones.

Mrs. Selway appealed from this decision.

The relinquishment by Flynn of the NE. $\frac{1}{4}$ of said section 1, removes that land from contest. Flynn did not appeal from your decision holding his entry subject to Jones's claim, and Mrs. Selway did not serve notice of her appeal on Jones, so he is not before this Department and his rights will not be passed upon.

I cannot agree with you that the law providing for the sale of desert lands prohibits the entry thereunder by a married woman. The statute provides:—

It shall be lawful for any citizen of the United States or any person of requisite age who may be entitled to become a citizen, and who has filed his declaration to become such, and upon payment of twenty-five cents per acre to file a declaration, etc.

In the face of these provisions of the statute I have discovered no good reason for changing the construction of the law adopted by this Department in former decisions.

In this case the enclosure of the land by Thomas Selway was without authority and illegal. The railroad company had no right to the control of the land, nor did it claim to have or to invest Selway with a right to enclose the same. His possession being without authority, his attempted transfer of a right to his wife, the appellant here, was of no effect. Neither Selway or his wife could acquire any legal claim or right to the land by a settlement made while the land was withdrawn from settlement. A claim to land under the desert land act is initiated by the application to enter and not by an act of settlement.

Mrs. Selway's application having been made subsequent to that of Flynn, must be refused as to the land covered by Flynn's entry—being the S. $\frac{1}{2}$ of said section 1, but may be allowed if she so desires for the land included in her application, and subsequently relinquished by Flynn—being the NE. $\frac{1}{4}$ of said section. Flynn's entry for the S. $\frac{1}{2}$ of said section will be allowed to remain intact subject to whatever right Jones may have in the SE. $\frac{1}{4}$ of the section by virtue of his pre-emption filing. Your decision is modified accordingly.

RAILROAD GRANT—CERTIFICATION BY THE LAND DEPARTMENT.

GARRIGUES v. ATCHISON, TOPEKA & SANTA FE R. R. Co.

Legal title passes as completely by certification, if patent is not expressly required by law, as though patent issued.

The certification of lands by the Land Department, acting within the scope of its authority, deprives the Department of all jurisdiction over them; and questions involving the legality of the certification must be determined in the courts.

Secretary Vilas to Acting Commissioner Stockslager, February 21, 1888.

I have considered the case of Anna Garrigues *v.* the Atchison, Topeka and Santa Fe Railroad Company as presented by the appeal of the first named from your office decision, dated January 14, 1887, approving the action of the local office rejecting her application to make homestead entry on the SE. $\frac{1}{4}$ of Sec. 17, T. 24 S., R. 11 W., also her application to enter under the timber culture law the SE. $\frac{1}{4}$ of Sec. 7, T. 23 S., R. 13 W., in the Larned Land district, in the State of Kansas.

Your said office decision assigns as a reason for the judgment therein contained that "these lands having all been certified to the State of Kansas for the benefit of the Atchison, Topeka and Santa Fe Railroad Company are not now subject to entry under the general laws."

The appeal sets out in substance that your office erred in holding that the lands in question are not subject to entry under the general lands laws; that although said lands have been certified to the State for the benefit of the railroad company, they were wrongly certified, being wholly outside of and beyond the twenty miles or indemnity limits

of the grant of Congress by the act of March 3, 1863 (12 Stat., 772), for the benefit of said company.

The question as to whether the lands were rightfully or wrongfully certified to the State is not one which the Department can now properly consider and pass upon. That is a question for the courts. It is sufficient to know that the lands have been certified by the Land Department acting within the scope of its authority, for by that certification the Department lost jurisdiction over them, the legal title having thereby passed out of the United States and vested in the State.

It is too well settled to call for argument or citation that where the law does not expressly require patent, legal title passes as completely by certification as if patent issued; and it will not be questioned that when the legal title has passed from the government, this Department is without authority over the lands to which such title relates. *Wisconsin Central Railroad Company v. Stinka* (4 L. D., 344); *Moore v. Robbins* (96 U. S., 530).

The lands in question having been certified to the State of Kansas for the benefit of the Atchison, Topeka and Santa Fe Railroad Company, it follows that the Land Department is without jurisdiction over them and your office decision rejecting the application of Anna Garrigues to enter the tracts herein described, and dismissing her appeal was correct, and said decision is accordingly affirmed.

RAILROAD GRANT—DEMAND UNDER THE ACT OF MARCH 3, 1867.

WINONA & ST. PETER R. R. CO. ET AL.

On the adjustment of a railroad grant under the act of March 3, 1867, demand for the reconveyance of lands, which appear to have been erroneously certified for the benefit of the company, will not be made until after notice to the company, to show cause in writing why proceedings should not be taken under said act for the restoration of said lands to the government.

Circular of November 22, 1857, modified.

Secretary Vilas to Acting Commissioner Stockslager, February 21, 1888.

By letter of January 10, 1888, you transmitted two lists of lands stated to have been erroneously certified to the State of Minnesota for the benefit of the Winona and St. Peter and St. Paul and Sioux City Railroad Companies under the grant of lands to that State, for railroad purposes, made March 3, 1857 (11 Stats. 195).

List "A" embraces lands contained in the odd numbered sections and which were selected and certified as indemnity lands for said roads, or one of them.

List "B" is of lands contained in the even sections along the line of said roads and were certified in lieu of lands claimed to have been re-

linquished by said roads or one of them under the provisions of the act of June 22, 1874 (18 Stats. 194).

These lists are transmitted for my action under the provisions of the act of March 3, 1887 (24 Stats. 556).

That act requires the Secretary to adjust "in accordance with the decisions of the supreme court" each of the railroad land grants made by Congress, and provides further that if on the completion of the adjustment, or sooner, it should appear that any lands had been erroneously certified to a company demand should be made for a reconveyance of the same to the United States; and upon failure of said company to make such reconveyance, within ninety days, then it becomes the duty of the Attorney General to institute and prosecute proper legal proceedings to restore the title of said lands to the United States.

Under the language of this act it may be a serious question whether, when the Secretary has once made such a demand, his jurisdiction in the premises is not ended and whether he can do anything further than transmit the papers to the Attorney General should the company fail to comply with the demand.

Ordinarily, when papers are transmitted to the Attorney General by this Department for the purpose of asserting through the courts the supposed rights of the government, such transmission is accompanied by a recommendation that suit be brought, if upon investigation the Attorney General should be of the opinion that it can be successfully maintained.

But under the language of this act all discretion seems to be taken away from that officer, and it apparently becomes his imperative duty to bring such suit forthwith.

Cases will arise doubtless in the adjustment of these railroad grants when it will appear from your records that lands have been erroneously certified to some company, yet if the true facts were known, or some explanation made, the error would disappear and the Secretary would not feel himself justified to either demand the restoration of said land, or recommend suit to restore the same. Yet, if such knowledge came only after demand, it may be well doubted whether either of the officers named would have any authority to reconsider his action, or in any way stop the proceedings directed by the law.

Under these circumstances, it seems to me, great circumspection should be exercised in the premises, and such means used as are within control to ascertain all the facts bearing upon the certification or patenting in question. And I can think of no better means of aiding in said ascertainment than to allow the company in question to be heard before, what appears to be, the final action of this department is taken and demand made for the return of the land.

You will therefore, on receipt hereof, notify the Winona and St. Peter and St. Paul and Sioux City Railroad Companies that, it appearing from your records, said lands have been erroneously certified for their

use, specifying the lands referred to, said companies will be allowed thirty days after service of notice within which to show cause, in writing, before you why proceedings should not be taken in accordance with the provisions of said act of March 3, 1887, to secure the restoration of said lands to the government. After the expiration of the time fixed in such notice, you will then certify up such lists and with them any showing made by the companies interested, with your opinion thereon.

Hereafter, similar action will be taken by your office in all like cases, prior to transmission of the same to this department. To this extent the circular of November 22, 1887 (6 L. D., 276), is modified.

MINERAL ENTRY—EQUITABLE ADJUDICATION.

NEWPORT LODGE.

A mineral entry may be submitted to the Board of Equitable Adjudication, where the only defect in the proof is a misdescription, of one of the lines of survey, occurring in the published notice of application, and such error appears to be through no fault of the applicant, and is without prejudice to the rights of third parties.

Secretary Vilas to Acting Commissioner Stockslager, February 23, 1888.

I have considered the appeal of the claimants from the decision of your office dated July 30, 1886, requiring new publication of notice in mineral entry No. 867, survey No. 1759 for the Newport Lodge mining claim, made May 20, 1884, at the Lake City land office, in the State of Colorado.

The record shows that your office, on June 23, 1886, considered the papers in said mineral entry, made by E. P. Hill, *et al.* and found that the published notice was insufficient, for the reason that the field notes described the line running from corner number one, 2252.2 feet, while the published notice states said line to be 2552.2 feet.

Your office, however, considered that said change was only a typographical error, and, since there was no evidence of bad faith, the applicants, if they so desired, would be allowed within sixty days from due notice to publish new notice of their application for patent, accompanying the same with proof of posting of notice in the local land office, and upon the land as provided by the statute, subject to any adverse claim.

Your office further required certain supplementary proof relative to the identification of the section corner with which said claim was connected. The required proof was subsequently furnished, and on July 30, 1886, your office again considered the case. Your last decision states that the applicants claim that said published notice referred to the

posted notices and the official plat which contained a correct description of said lode, and, therefore, the addition of three hundred feet in said published notice, to the length of said connection as established by the survey, could affect only the claims lying between the one in question and the Lake City Lode, survey No. 672, "A," and since there were no claims between the two lodes aforesaid, the error in the published notice was error without injury.

But your office refused to concede the claim of the appellants, and held that under the provisions of section 2325, R. S., the notice must be "complete in itself accurately describing the character and extent of the right claimed and definitely pointing out the property applied for under such right"; that third parties have a right to rely upon the representations contained in the published notice, and if such notice is erroneous, they are not concluded thereby. Conceding the correctness of said ruling relative to the effect of said section 2325, R. S., and also of the rights of third parties, yet, I am of the opinion that the circumstances as shown in the case at bar, warrant the Department in making it an exception to the rule. It is difficult to perceive how the rights of third parties can be prejudiced by said notice which by change of the figure 2 to 5 made the connecting line 300 feet more than in the field notes.

It was not the fault of the applicants, their good faith is conceded, and it would be an unnecessary hardship, since the requirements of the statute have been substantially complied with, to require new publication.

In the case of the New York Lode and Mill Site Claim (5 L. D., 513) the entry was made on an application covering a lode claim and contiguous mill site. The proof was sufficient except that the plat and notice of application for patent had not been posted upon the mill site portion of the claim as required by Sec. 2337 R. S., and the regulations of the Department. Your office held for cancellation the entry as to the mill-site portion thereof. But the Department reversed said decision of your office and directed that the applicant should be allowed sixty days within which to file a written application that said case should be submitted to the Board of Equitable Adjudication. Such action should be taken in the case at bar. Your attention is also called to the omission from the record, as transmitted from your office of the plat of survey. The plats are a part of the record and should be transmitted with the papers.

The decision of your office is accordingly modified, and the applicants will be advised that they will be allowed sixty days within which to file application for the submission of this case to Board of Equitable Adjudication.

DESERT LAND ENTRY—EQUITABLE ADJUDICATION.

ALEXANDER DOUGLAS.

A desert land entry may be submitted to the Board of Equitable Adjudication for confirmation, where the only non-compliance with law is failure to submit final proof within the statutory period, and such delay is satisfactorily explained.

Secretary Vilas to Acting Commissioner Stockslager, February 23, 1888.

I have considered the case arising on the appeal of Alexander Douglas from your office decision of April 23, 1886, refusing to allow him to make proof of the reclamation of the land embraced in his desert land entry No. 45, Santa Fe district, New Mexico, embracing two hundred and forty acres.

From the record (including the entryman's affidavit on appeal), it appears that said entry was made October 27, 1882. The entryman complied with the requirements of the law, and in the summer of 1885, about three months prior to the expiration of the three years within which the law requires that proof of reclamation must be made, he inquired of Mr. Frost, the then register of the land office at Santa Fe, what course to pursue, in view of the fact that the public survey had not been extended over the land. He was told by the register that of course he could not prove up until the tract had been surveyed; therefore, awaiting such survey, the entryman took no further steps in the matter. January 12, 1886, Mr. Douglas was notified by the new register, Charles F. Easley, that the time within which he should have made final proof on said entry had expired, and that he would be allowed ninety days to show cause why his entry should not be canceled. The entryman, by advice of counsel, made application to your office for an extension of time in which to make final proof—in order that he might procure a survey of the land preliminary to making the same. To this your said office letter (of April 23, 1886, *supra*,) replies:

The desert land act, and the rules and regulations of this office prescribed thereunder, require the entryman to make final proof of the proper reclamation of the land, whether the same is surveyed or unsurveyed, within three years after filing his declaration, and the issue of certificate by the register; I have no authority in law to extend said period of time, and therefore can not grant the request. In view of the foregoing said entry is held for cancellation.

It is to be noticed that the entryman did not apply for an extension of time in which to make further improvements, but for an extension of time within which to prove that he had made such improvements as the law demanded within the time which the law prescribed. That he did make such improvements, within the prescribed time, he alleges under oath in the affidavit accompanying his appeal. This allegation is corroborated by other witnesses, and by a report of special agent J.

N. Smithee, of your office, who writes regarding this entryman and his entry :

He is a man of high standing, and really and in truth is one of the few men in this district who has strictly complied with the law in respect to desert land entries I am thoroughly satisfied that if the entry is canceled a great wrong will be done the entryman. He was ill-advised by the former register, Mr. Frost. Becoming satisfied of that fact, he placed the matter in the hands of Ex-Surveyor General Atkinson, now deceased. If the Department has the power to permit him to make his proof now, the ends of justice would be subserved in every respect.

This Department decided, in the case of Alexander Toponce (4 L. D., 261), that a person who had made every endeavor to procure water for irrigating purposes, but had failed (good faith being shown, and no adverse claim having intervened,) might make final proof although at the end of four years after the expiration of the three years prescribed by law the land was not irrigated—the most that the entryman could say being that the canal for that purpose was “now under construction,” and that he “will procure sufficient water therefrom to irrigate the land.”

Without approving that decision, the thorough good faith of the entryman in the present case, the satisfactory explanation of his delay in making proof, and his actual compliance with the statute—his omission to make proof within the limited time being the only non-compliance—I think the case one which should be submitted to the Board of Equitable Adjudication for relief from the limitation of the law as to time of proving. I therefore reverse your said office decision of April 23, 1886.

PRE-EMPTION FINAL PROOF—RESIDENCE.

W. V. S. PARKS.

Final proof must be clear and explicit, showing that the entryman has fully complied with the law in all essential requirements.

Secretary Vilas to Acting Commissioner Stockslager, February 25, 1888.

I have considered the appeal of William V. S. Parks, from the decision of your office, dated February 26, 1886, holding for cancellation his pre-emption cash entry.

The records in the case show that claimant on March 21, 1883, made and filed declaratory statement, No. 1993, for the NE. $\frac{1}{4}$ of Sec. 30, T. 113, R. 74, in the United States land office at Huron, Dakota, alleging settlement March 4, 1883.

On February 21, 1884, the register duly published a notice that said settler had filed a notice of his intention to make final proof in support of his claim, on Saturday, April 5, 1884, before the register and receiver at Huron, Dakota.

Claimant appeared in person before the local officers at the time and place mentioned in the said published notice, and presented his pre-

emption proof, which was thereupon approved by the register and receiver, who in due time transmitted the same to your office.

On February 26, 1886, your office decided that "the claimant fails to establish by proof of himself or witnesses, the fact that he resided upon the land entered continuously for six months prior to making final proof," and held his entry for cancellation, allowing him sixty days in which to appeal.

* * * * *

After fully considering all the proofs in this case, I find them to be insufficient, as the entryman has failed to state how frequently the periods of his absence from the land occurred, and how many days less than thirty he was absent each time. It can not be determined by the proof whether he was on the land six months or only six days from the date of his entry to the date of making final proof; nor does it appear that he ever slept one night on the tract; or that he ever had any bedding, cooking utensils, or any article of household furniture in the house during said period.

The decisions of this Department all hold that final proof should be clear and explicit, showing that the entryman fairly and fully complied with the requirements of the law as to residence, cultivation and improvement. In this case at bar, it is very evident that Parks has failed to show such compliance, and although his temporary absences owing to necessity may be excusable, yet, he should have stated the time or times, he went, and also the dates of his return to the tract, and the cause of the same.

You will therefore direct the local officers to give, immediately, written notice to the claimant that his proofs heretofore submitted are rejected, and that his entry will stand canceled, unless within sixty days from the service of such notice he shall furnish proof, satisfactorily showing full compliance with the law, in good faith, and that upon failure to furnish such proofs within the time limited, they will cancel the entry accordingly; and that upon receipt of such further proofs, as shall be proffered within the time, they will promptly report the same to you, with their opinion thereon.

The decision of your office is modified accordingly.

ENTRY OF INSANE PERSON—ACT OF JUNE 8, 1880.

SWANSON v. ANDERSON.

Under the act of June 8, 1880, where persons have initiated claims under the homestead or pre-emption law, and subsequently become insane, it is lawful for final proof to be made, for the benefit of the entryman, by any person legally authorized to act for him during such disability.

Secretary Vilas to Acting Commissioner Stockslager, February 27, 1888.

John Anderson, on August 16, 1882, made homestead entry of the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, and the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, of Sec. 30, T. 17 N., R. 4 E., Olympia land district, Washington Territory.

A charge of abandonment having been preferred by Swan Swanson, a hearing was held on May 4, 1885. On June 27, same year, the local officers rendered joint decision to the effect that abandonment had been proven.

On July, 6, 1885, there was filed in the local land office an affidavit, dated July 2, 1885, of one Mathilde Olson, setting forth that she was cousin of said entryman, Anderson; that in August, 1884, said Anderson became violently insane, and wandered away from his home, and that his whereabouts had never since been discovered, though diligent search had been made for him; that affiant communicated these facts to Anderson's mother, in Sweden, and was by her given full power of attorney, and was requested to take charge of the property and effects of said Anderson; that prior to Anderson's departure in such insane condition, he had complied with the requirements of the homestead law—having ditched and drained eighty acres of the tract, built a substantial log house with four rooms, and made many other valuable improvements, and had resided on the tract as demanded by the statute; that the fact of such compliance with the law up to the time of the entryman's becoming insane was well known to Swanson at the time of his initiating contest; that affiant had applied for letters of guardianship and administration; and therefore affiant asked that the case before the local office at Olympia be held in abeyance until the issuance of said letters of administration.

On the 27th of July, 1885, Mathilde Olson was by the probate court, after the customary hearing, appointed guardian of said John Anderson and his estate.

The affidavit hereinbefore spoken of, together with a certified copy of the appointment of Mathilde Olson as guardian, and other papers in the case, were duly transmitted to your office—which, on March 17, 1886, reversed the decision of the local officers, and dismissed the contest. From this decision Swanson appeals.

The act of June 8, 1880 (21 Stat., 166), was enacted with special reference to such a contingency as this. Said act provides that where persons who have regularly initiated a claim to public lands under the homestead or pre-emption laws, shall become insane, it shall be lawful for proof to be made for their benefit by any person legally authorized to act for them during their disability, provided that it shall be shown that the parties complied in good faith with the legal requirements up to the time of their becoming insane.

In the case at bar no abandonment, or other failure to fulfill the requirements of the law, having been proven to have occurred prior to the entryman's becoming insane, your decision dismissing the contest is affirmed.

*PRACTICE—SERVICE OF NOTICE.***BAKER v. SUTHERLAND.**

Service of notice by a party in interest is permissible under Rule 10 of Practice.

Secretary Vilas to Acting Commissioner Stockslager, February 27, 1888.

I have considered the case of William Baker v. James Sutherland, on appeal by the latter from your office decision of March 31, 1886, holding for cancellation his timber culture entry for the S. $\frac{1}{2}$ of SE. $\frac{1}{4}$, NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ of SW. $\frac{1}{4}$, Sec. 28, T. 11 N., R. 20 W., Grand Island, Nebraska.

The entry was made March 24, 1881. Complaint was filed March 28, 1885, alleging "failure to break or cause to be broken on said tract an amount to exceed seven acres, and failure to plant or cause to be planted any timber, tree-seeds nuts, or cuttings on said tract." The local officers issued notice that the testimony of the parties would be taken on May 18, ensuing, before the county judge of Dawson county, and that the final hearing be had at the local office on May 28. This notice was served on claimant by contestant in person.

At the time designated, contestant appeared before said judge and submitted testimony sustaining said allegations, claimant not appearing. On May 28, when the local officers called the case, claimant appeared specially and moved to dismiss the contest, for the reason that "there is no legal service of the notice of said contest, or of the taking of depositions therein. The notice purports to have been served by the party in interest in this contest, and in no other way." The motion was overruled and decision rendered for contestant, no testimony being offered by claimant.

The only question presented here is that raised by said motion and must be decided adversely to claimant.

Rule of practice 9 declares that "Personal service . . . shall consist in the delivery of a copy of the notice to each person to be served." Rule 10 provides that "Personal service may be executed by any officer or person." Under this rule service of notice may be made by a party in interest.

Said decision is therefore affirmed.

*SCHOOL INDEMNITY SELECTION—ACT OF MARCH 1, 1877.***D. C. POWELL (ON REVIEW).**

If by public survey, approved after the passage of the act of March 1, 1877, a school section is found in place; and not within a Mexican grant, a selection made in lieu of such section is confirmed by said act, although the final survey of such grant which excluded the school section, was made prior to the passage of said act and date of selection.

Secretary Vilas to Acting Commissioner Stockslager, February 27, 1888.

I am asked to review the decision of the Department of November 3, 1887 (6 L. D., 302), in the matter of the application of D. C. Powell, to

purchase under the second section of the act of March 1, 1877 (19 Stat., 267), a certain tract of land selected by, and approved to, the State of California, prior to March 1, 1877, as indemnity in lieu of a sixteenth section alleged to be within the patented limits of the Rancho San Miguelito.

The said section under which this application is made provides :

That where indemnity school selections have been made and certified to said State, and said selections shall fail by reason of the land in lieu of which they were taken not being included within such final survey of a Mexican grant, or are otherwise defective or invalid, the same are hereby confirmed, and the sixteenth or thirty-sixth section in lieu of which the selection was made shall, upon being excluded from such final survey, be disposed of as other public lands of the United States : *Provided*, that if there be no such sixteenth or thirty-sixth sections, and the land certified therefor shall be held by an innocent purchaser for a valuable consideration, such purchaser shall be allowed to prove such facts before the proper Land Office, and shall be allowed to purchase the same at \$1.25 per acre, not to exceed three hundred and twenty acres for any one person ; etc.

The Rancho San Miguelito was patented August 8, 1867, but the township plat was not filed until July 18, 1884. The selection was approved to the State May 16, 1870. Powell holds title to the land in controversy as purchaser from the State of California, but makes application to purchase from the United States under the second section of said act, because he questions the validity of the State's title.

The Department by its decision of November 3, 1887, sustained the validity of the State's title holding that :

The intent of the act of March 1, 1877, was to confirm to the State all defective or invalid selections which had been made and approved to the State prior to its passage, excepting (1) those occupied by *bona fide* settlers prior to such certification, (2) those mentioned in the first proviso to the second section of said act, and (3) those selections made in lieu of a sixteenth or thirty-sixth section which had been surveyed in place and the title to which had vested in the State at the date of said selections.

The motion for review is made upon the ground that the Department in its said decision did not fully consider the question, whether the act of March 1, 1877 confirmed selections in cases where the sixteenth section, used as the basis of indemnity, was excluded from the limits of a Mexican grant by a final survey made prior to the date of said act.

In this case the final survey of the Mexican grant was made prior to the passage of the act, but the survey of the township designating the sixteenth and thirty-sixth sections was not made until 1880, after the selection had been made. The survey of the township showed that the sixteenth section had not been included in the final survey of the grant, and hence it is argued by the counsel that, as the school grant attached to said selection upon being excluded by the survey of the grant, the title in the State then became complete, and no subsequent act could divest it.

The final survey of the grant may have been made prior to the passage of the act and prior to date of selection ; but until the township plat is filed the school grant does not attach to any specific tract and it cannot be definitely ascertained that a sixteenth or thirty-sixth section is not included within the limits of the grant although such may be the fact. If by the approved public survey, approved after the passage of the act, a school section shall be found in place and not included in a Mexican grant, the selection made in lieu of such school section is confirmed by the act, although the final survey of the Mexican grant had been made prior to the passage of the act and date of selection, which excluded the school section.

The intent of the act of March 1, 1877, was to confirm all selections made by the State upon the basis of sixteenth or thirty-sixth sections (except those of the character mentioned in section 4) where it had been definitely determined by the township survey that said section was not included within the limits of a Mexican grant, although the final survey of said grant had been made prior to said selection, which excluded the school sections, as afterwards shown by the public survey. It is therefore immaterial when the right of the State attached to the school section ; having selected other land in lieu of it, and the act of March 1, 1877, having confirmed such selections, it amounted to an exchange of lands binding upon both the government and the State.

The second section of said act provides for the right of purchase only in the following cases, to wit :

That if there be no such sixteenth or thirty-sixth sections, and the land certified therefor shall be held by an innocent purchaser for a valuable consideration, such purchaser shall be allowed to prove such facts before the proper Land Office, and shall be allowed to purchase the same at \$1.25 per acre, not to exceed three hundred and twenty acres for any one person ; etc.

The selection in controversy having been made upon an existing sixteenth section as a basis, Powell has no right of purchase under the act, even if the selection had not been confirmed ; Congress having provided for the purchase of defective selections only in cases where it appeared that there was no basis for the selection ; it is evident that it confirms all other selections except those of the character embraced in section 4, where it was not definitely known at the date of selection that the basis was not included in a Mexican grant, or were otherwise defective or invalid.

This question was definitely settled by the supreme court in the case of *Durand v. Martin* (120 U. S., 374), in which the court say :

The selection was confirmed and the United States took in lieu of the selected land that which the State would have been entitled to but for the indemnity it had claimed and got. In its effect this was an exchange of lands between the United States and the State. * * * *

Under these circumstances, it was a matter of no moment to the United States whether the original selection was invalid for one cause

or another. If the State was actually entitled to indemnity, it was got, and the United States only gave what it had agreed to give. If the State claimed and got indemnity when it ought to have taken the original school sections, the United States took the school sections and relinquished their rights to the lands which had been selected in lieu. And if the State had claimed and sold land to which it had no right, and for which it could not give school land in return, an equitable provision was made for the protection of the purchaser by which he could keep the land, and the United States would get its value in money. In this way all defective titles, under the government certificates, would be made good without loss to the United States. See also *Hambleton v. Duhaime* (71 Cal., 141).

I see no error in the decision complained of, and the motion is denied.

PUBLIC SURVEY—MEANDER LINES—BOUNDARY.

JAMES HEMPHILL.

In the survey of a tract of land bordering upon a body of water, meander lines are run, not as the boundaries of such tract, but for the purpose of determining the quantity of land subject to sale.

The true boundary of such a tract is the water line; and a patent for a tract thus bounded conveys all the land included within the water line, though some portions thereof may be excluded by the meander line.

Secretary Vilas to Acting Commissioner Stockslager, February 27, 1888.

I am in receipt of your office letter, dated January 13th ultimo, transmitting for departmental instruction, relative thereto, the application, dated December 5, 1887, of James Hemphill, of Jennings, Michigan, for the survey of what he claims is an island situate in Goose Lake, in sections 26 and 35, of township 23 north, range 8 west, Michigan.

* * * * *

The facts appear to be that the land in question is the end of a peninsula extending into the lake and existing undoubtedly at the time of the original survey in substantially its present condition, except as its surface may have been altered by the hand of man. The plat of the survey does not show any island; according to the plat the south and west boundary lines of the fractional lot were surveyed lines, and the north and east lines the waters of the lake. The meander line, by which, on the plat, the east and north sides of the fractional lot were roughly indicated, appears not to have accurately followed the course of the shore, but to have passed across the neck of the peninsula so as not to have included in the computation of the contents of the fractional lot all of the land upon the peninsula. It would appear that if the meander line were to be traced upon the land it would leave outside of it the projecting end of the peninsula, which is now called an island by the applicant for this survey. Upon this state of fact, the question is, whether the land was conveyed by the original patent from the United States

granting fractional lot 13, or whether the land though within the water-line, which lies exterior to the meander line, remained the property of the government.

You recommend that Hemphill's application for survey "be disallowed, for the reason that said lands are in fact part of the bed of the meandered lake." I concur in the decision, but cannot in the reason. The statutes of the United States directing the public surveys require that in certain cases water-courses shall be made the boundaries of land. These are cases where the straight lines of the rectangular surveys cannot be established upon the grants because of their being interrupted by such water-courses. But no statute authorizes a surveyor to establish an irregular line as the boundary of the tract on the side of such water courses. It is the water-course which, by the law, then bounds the land. In this case the surveyor established, in correct compliance with the statute, the south and the west boundary lines of the lot, leaving the north and east sides to be irregularly bounded by the course of the water. The plat made by him represents the lot accordingly, but, as is generally the case, the water-line drawn upon the plat is not an accurate reproduction of the shore or water line, but is drawn in accordance with his meander line. The law in such a case is not open to question. The meander line is not run by the surveyor as a boundary line, nor was he authorized by the statutes to make a different boundary line than the water. "Meander lines are run in surveying fractional portions of the public lands bordering upon navigable rivers, [and as well upon inland lakes of water,] not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of the land in the fraction subject to sale, and which is to be paid for by the purchaser." *Railroad Co., v. Schurmeir* (7 Wall., 287).

When, therefore, a patent was given of fractional lot 13, reference for its boundaries was impliedly made to the official plat and the statutes, and these showed the natural landmark of the water on the north and east sides as the limits of the lot. This natural landmark is not to be disregarded because the meander line was inaccurate. The mistake of the surveyor, even though it were willfully or recklessly made, in failing to accurately trace the natural landmark and to embrace all the true contents of the lot in the computation of its area, is not a mistake which altered the surveyed boundaries. Its effect was, it is true, to deprive the government of the full price which might have been demanded for the land by diminishing the acreage, reported below the true quantity. This is an effect often resulting from inaccurate meander lines in the surveys, but it cannot be allowed that the purchaser from the United States according to the plat,—much less those who have taken title through mesne conveyances,—shall be deprived of the area which the boundaries of the lot as shown by the plat entitle them to have. The rule is familiar that courses, distances and quantities, as

points of identification of a grant, must yield to natural or fixed landmarks upon the grant. *Shufeldt v. Spaulding et al.* (37 Wis., 662).

Upon the facts as represented, therefore, the lands sought to be surveyed cannot be regarded as part of the public land remaining unsurveyed, and the application for survey is denied.

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SOLDIERS' ADDITIONAL HOMESTEAD—CERTIFICATION—MISSOURI HOME GUARD.

SMITH HATFIELD ET AL.

The circular of May, 17 1877, authorizing the certification of the right to make soldiers' additional homestead entry, did not contemplate or authorize the issue of such certificates to members of the Missouri Home Guards.

Though the circular of February 13, 1883, which discontinued the practice of certifying additional rights, reserved from the effect of such order pending cases and those filed within a specified period, such exception was not a guaranty that certificates would issue in said cases, but merely an assurance of their adjudication under the circular of May 17, 1877.

The act of May 15, 1886, authorizing the Secretary of War to issue certificates of discharge to the members of the Missouri Home Guards does not warrant the Department in returning to the practice of certifying additional homestead rights.

Secretary Vilas to Acting Commissioner Stockslager, March 1, 1888.

I have before me the application of Smith Hatfield *et al.*, for certification of additional homestead rights, transmitted by your office letter of April 7th last, in response to instructions of March 22, 1887.

The applicants were members of the Missouri Home Guards, a State military organization.

It appears from the records that applicants have made homestead entries of less than one hundred and sixty acres each.

The application is made under section 2306 of the Revised Statutes, which provides that:

Every person entitled under the provisions of section 2304 to enter a homestead who may have heretofore entered, under the homestead laws, a quantity of land less than one hundred and sixty acres, shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed one hundred and sixty acres.

Said section 2304 provides that:

Every private soldier and officer who has served in the Army of the United States during the recent rebellion, for ninety days, and who was honorably discharged, and has remained loyal to the government, including the troops mustered into the service of the United States by virtue of the third section of an act approved February 13, 1862, and every seaman, marine, and officer who has served in the Navy of the United States, or in the Marine Corps, during the rebellion, for ninety days, and who was honorably discharged, and has remained loyal to the government, shall, on compliance with the provisions of this chapter, as hereinafter modified, be entitled to enter upon and receive pat-

ents for a quantity of public lands not exceeding 160 acres, or one quarter-section, to be taken in compact form, according to legal subdivisions, including the alternate reserved sections of public land along the line of any railroad or other public work, not otherwise reserved or appropriated, and other lands subject to entry under the homestead laws of the United States; but such homestead settler shall be allowed six months after locating his homestead, and filing his declaratory statement, within which to make his entry and commence his settlement and improvement.

The record shows that your office, on September 11, 1883, rejected said application, on the authority of the case of William French (2 L. D., 235, and on review, 238), wherein it was said :

William French was a member of the "Missouri Home Guard" and as such was not entitled to the benefits of section 2306 of the Revised Statutes. An additional homestead entry made by him was illegal at its inception, because the service upon which the right to make such entry was based was not in the army of the United States.

Claimants thereupon appealed to this Department. Action on the appeal was deferred from time to time on request of the attorneys for claimants.

While the appeal was thus pending, the act of May 15, 1886 (24 Stat., 23), was passed. It provides :

That the Secretary of War be and is hereby authorized and directed to furnish upon their several applications therefor, a certificate of discharge to each and every member of the Missouri Home Guards whose claims for pay were adjudicated by the Hawkins Taylor commission, under the act approved March 25, 1862, and the several acts supplementary thereto.

In view of this enactment, the cases were returned to your office, by letter of August 17, 1886, in order that you might pass on the questions involved in the light of the new legislation.

By letter of September 6, 1886, your office, after stating that several "discharges" issued in July, 1886, under said act of May 15, to certain of the claimants, were found among the papers, concluded :

It would seem from the above that the discharge under said act of May 15, 1886, recognizes the fact of their military service in the United States army during the war of the rebellion, and brings the members (as to such service), who served ninety days, and who received an honorable discharge, within the provisions of section 2306, R. S. U. S., and entitles such members, who are in all other respects entitled, to the right of soldier's additional homestead entry; but as I am of the opinion, and so decided on the 12th instant, in the case of the application of John M. Walker for certification of his right to make an additional homestead entry, that there is no authority of law or otherwise directing or requiring me to certify to such right of entry, I must decline to do so.

Referring to your said decision in the case of Walker, I find the following reasons assigned for your refusal to issue the certificate :

There is no statute that provides for or requires directly or by implication, a certification of that nature. The papers proposed to be

certified are not copies of any papers on file in this office, nor are they any part of the records of this office. They are claimed as personal property, and as the property of the persons who appear nominally as attorneys for the soldier or of persons other than the soldier whom the attorneys really represent.

The papers are not claimed as the property of the soldier. The soldier gets no benefit from the certification nor from the entry. He has parted, so far as he can, with his right of entry, and the transfer of a claim held to be non-transferable is usually accomplished as is well-known by a power of attorney, generally executed in blank, authorizing a conveyance of the land. The device of certification enabled the soldier's right to become a matter of traffic in which the material benefits inured to the traffickers. It was an evasion of the law, and a fraud upon the soldier, and offered inducements for the presentation of fraudulent claims upon the government.

The following recital will indicate the former action taken by the Department in reference to the practice of certifying additional homestead rights:

Secretary Chandler to Commissioner of the General Land Office, May 17, 1876.

I have considered your report of the 9th instant, upon the subject of frauds in soldiers' additional homestead entries, by which it appears that large numbers of entries have been made upon forged applications, and genuine applications by parties not entitled, and that the right to make such entries is the subject of sale and transfer, effected by means of two powers of attorney—one to make the entry, and the other to sell the land when entered.

Your instructions of August 5, 1874, approved by the Department, provided that the requisite affidavit in this class of cases might be made before the clerk of any court of record for the county in which the applicant resided, and transmitted with the application and fees by mail, or through an attorney, to the land office of the district in which the land applied for should be situated.

The purpose of this regulation was to relieve the applicant of the alleged hardship imposed by the requirement of personal attendance at the land office of the district in which the entry is to be made.

While it is doubtless true that the requirement of personal attendance in many cases must cause inconvenience and expense to the applicant, experience has demonstrated that to dispense with it will open the door to frauds of serious magnitude, and that under existing laws the requirement is essential to the protection of the interests of the government.

I have, therefore, to direct that the instructions embodied in your circular of August 5, 1874, be revoked, and that in future all persons entitled to enter additional homesteads be required to make their applications in person, with due proof of identity, at the land office of the district in which the desired land is situated, and that the affidavit required by the regulations of this Department upon such applications be made before the register and receiver of such office, and further that no entry of such homestead be permitted by attorney.

The foregoing requirements are believed by me, after a careful examination of the subject, to be necessary for the protection of the gov-

ernment against fraudulent entries, and I am also satisfied that they are fully sustained by the statute regulating homesteads. . . . The right to make entry is not assignable, and in all cases the applicant should be required to make oath that he has not made or agreed to make any sale, transfer, pledge, or other disposition of his right to make the entry, or the land which he applies to enter. (2 C. L. L., 486).

These regulations were made applicable to applications and entries then pending.

Instructions thereunder were issued May 22, 1876 (Ibid. 488).

Afterwards, on July 10, 1876, Secretary Chandler issued the following modification of said regulations:

Referring to my communication of the 17th of May, 1876, upon the subject of soldiers' additional homestead entries, it now appears that owing to the death or change of residence of the soldier it is often difficult, and in many cases impossible, to procure his attendance at the local land office for the purpose of making the required affidavit, and in other cases where the entry has been made at a land office remote from the residence of the soldier and the land subsequently sold, the soldier has no longer any inducement to comply with the order of May 17th, above referred to. I have therefore determined to modify my order of the date above mentioned so far as the same relates to applications for entry which were pending at its date, and to allow all such entries as appear to have been made by a duly qualified person in accordance with the regulations of the Department then in force. . . . All entries made subsequent to May 17, 1876, will be governed by the regulations now in force. (Ibid., 480).

By letter of March 10, 1877, the Secretary further modified his decision of May 17, 1876, as follows:

I have considered your report of the 17th ultimo, in relation to soldiers' additional homestead entries, and in view of the facts therein stated, I have determined to modify my decision of May 17, 1876, so as to permit entries to be made in the following cases, viz:

1st. Those presented prior to order of March 20, 1876, suspending all entries of this kind, and rejected for reasons insufficient in law to bar their reception, but kept alive by appeal, which by such rejection were postponed beyond the date of the order, and so lost.

2d. Those actually in the hands of agents or attorneys at the date of the promulgation of your instructions of May 22d last, in execution of my decision of the 17th of the same month, which, under said instructions, have not been recognized and which still remain in the hands of such agents or attorneys; and

3d. To allow entries to be made by the agents or attorneys of the party originally entitled to the entry, but only after the claim has been presented to you and certified as valid, and that the party is entitled to the amount of land claimed, under such instructions and regulations as you may prescribe. (Ibid., 478).

Thereupon the circular of May, 17, 1877, embodying said instructions, was issued. After describing the papers necessary to be presented with the application for additional entry the circular concluded:

When these papers are filed and examined, they will, if found satisfactory, be returned with a certificate attached, recognizing the right

to make additional entry under the law; and when presented with a proper application at any district land office, either by the party entitled, or his agent or attorney, they will be accepted by the register and receiver, and forwarded with the entry papers to this office, in the usual manner. (Ibid.).

Thus the practice of certifying to the right to make additional homestead entry originated.

This practice continued until 1883, when it was discontinued by the circular of February 13. After citing said section 2306, the circular continued:

The right granted by this section is a *personal* one and is not transferable, nor subject to assignment or lien, nor can it be exercised by another. It can lawfully be exercised by the soldier, or sailor, or by the widow or guardian as the case may be, in his or her own proper person.

The practice which has hitherto prevailed of certifying the additional right as information from the records of this office and permitting the entry to be made by an agent or attorney is hereby discontinued.

The circular proceeding prescribed certain rules governing applications for these rights, requiring the applicant to present himself at the local office as in other homestead entries, to prove his identity and military service and to state on oath that he had not previously exercised his additional right by entry, sale, transfer, or power of attorney, and concluded:

These rules will not be deemed to apply to cases where the additional right has heretofore been certified by this office, nor to cases now pending, or which may be filed in this office prior to March 16, 1883. (1 L. D., 654.)

The claims herein were filed on March 14, 1883, two days before the expiration of the time fixed by the circular.

The claim of the present applicants rests entirely on the circular of May 17, 1877. They say, "the appeal brings before you only the question of the certification of that right (additional homestead) and its enjoyment as assured under the circular of May 17, 1877." They further urge that these applications "were made and filed under the regulations of the Department contained in circular of May 17, 1877."

Appellants do not claim that they are entitled to certification by virtue of any statute, nor could such claim be sustained. Certification is not prescribed by law, but is a device adopted for a time by this Department in its efforts to accomplish the object of the soldiers' additional homestead law.

I cannot find that the circular of May 17, 1877, contemplated the issue of such certificates to members of the Missouri Home Guards. It has been the constant opinion of this Department that the Missouri Home Guards were not entitled to soldiers' additional entries. The case of Willaim French, *supra*, decided by your office September 12, 1882, and affirmed by this Department August 30, 1883, fully sets forth the rea-

sons therefor. See also Wilson Miller, *et al*, decided by your office September 23, 1879, and by this Department January 3, 1880 (6 C. L. O., 190). These cases arose prior to the passage of the act of May 15, 1886. What effect that act may have on the rulings of this Department with reference to such additional homestead rights is not decided or indicated herein.

As it was held that the members of this organization were not entitled to the right of such additional entry, it follows, of course, that they were not entitled to certification of that right, and as clearly follows that these cases were not in the purview of the circular providing for certification. Moreover, these cases were filed at a time when the repeated decisions of the Department declared that such applicants were not entitled to soldiers' additional entries, and consequently not entitled to certification. As the circular of May 17, does not contemplate certification of this right to the members of the Missouri Home Guards, there is no other basis for the claim and it must fall.

Nor does the act of May 15, 1886, *supra*, affect this conclusion. That act merely provides that the Secretary of War shall issue certificates of discharge from the army, to those members of the Missouri Home Guards whose claims for pay were adjudicated by a certain commission.

The expression in the circular of 1883, "These rules will not be deemed to apply to cases where the additional right has been heretofore certified by this office, nor to cases now pending, or which may be filed in this office prior to March 16, 1883", was not a guaranty that every applicant who filed his claim prior to March 16, should receive the certificate.

Conceding the utmost that can be claimed for the circular of February 13, 1883, it never guaranteed to pending claims or those filed prior to March 16, more than an adjudication of such claims in accordance with the circular of May 17, 1877. Under the most favorable rulings that ever obtained while that circular was in force, the claims now under consideration could not have been allowed.

I find no warrant in the act of 1886 for returning to the practice of issuing certificates of the homestead right.

As a means to secure the benefits of section 2306 to the soldier, the practice proved a failure, and after a full trial was abandoned in the circular of 1883. It was then found necessary to require the soldier to go in person to the local office and there make his entry. I am entirely satisfied of the wisdom and legality of such requirement and I find no reason for departing from it in this case.

Said decision is accordingly affirmed.

*PRACTICE—JUDGMENT OF CANCELLATION—ENTRY.***JOHN H. REED.**

When a final judgment of cancellation is rendered by the Commissioner of the General Land Office the entry is thereby canceled, and the land opened to appropriation, without waiting for the expiration of the time allowed for appeal from such judgment.

An application to enter, filed during the time allowed for such appeal, should be received subject to the right of appeal, but not made of record until the rights of the former entryman are finally determined, either by the expiration of the time allowed for appeal, or by the judgment of the appellate tribunal.

Secretary Vilas to Acting Commissioner Stockslager, March 1, 1888.

I have considered the appeal of John H. Reed from your office decision of June 16, 1885, rejecting his application to make homestead entry for the SW $\frac{1}{4}$, Sec. 3, T. 113 N., R. 77 W. Huron land district, Dakota.

John Harte made timber culture entry for this land January 22, 1883, which entry was finally canceled for fraud April 22, 1884. In the mean time, two homestead entries, that of Harry Hamill, dated February 2, 1884, and that of George G. Reed, February 4, 1884, had been allowed on this land.

By letter dated July 12, 1884, your office ordered these entries canceled for illegality without prejudice. George G. Reed's entry was canceled on the records of the local office July 18, 1884, and he was on the same day allowed to make a new entry for the same tract on affidavit, dated July 7, 1884. Hamill's entry was not canceled on the records of the local office until July 21, 1884, and on that day his application to make new entry for this same land was rejected by the local officers because George G. Reed had made entry therefor on July 18. Hamill appealed from this action, and your office decision of December 27, 1884, held George G. Reed's entry to be illegal, canceled it and directed the local officers to allow Hamill's application subject to Reed's right of appeal.

By letter dated December 29, 1884, the local officers transmitted to your office Hamill's relinquishment of "all right and title" to said land.

Under the instructions of your office letter of December 27, 1884, the local officers on January 5, 1885, noted on their record the cancellation of George G. Reed's entry.

On January 23, 1885, John H. Reed made his application to make timber culture entry for this tract, which was by the local officers rejected, and Reed appealed. On February 9, 1885, Samuel M. Bennett made application to make timber culture entry for this land, which was rejected by the local officers and Bennett appealed. These appeals were, by request of the parties, considered at the same time and dis-

posed of by your office decision of June 16, 1885, wherein you affirmed the action of the local officers in rejecting the applications because the sixty days allowed George G. Reed to appeal from your decision of December 27, 1884, had not expired. From this decision John H. Reed alone appealed.

You base your approval of the action of the local officers in rejecting the applications of John H. Reed and Samuel M. Bennett in part, upon the fact as alleged in your decision of June 16, 1885, that Hamill's entry remained intact upon the record. Hamill had, however, previously relinquished all his right to the land and your said office decision is in error in that particular.

The only other question presented in this case is, at what date was George G. Reed's entry canceled and the land restored to the public domain? There is no question as to the authority of the Commissioner of the General Land Office to cancel an entry, and his judgment of cancellation can be vacated and set aside by the appellate tribunal only at the instance of the entryman, or his legal representatives.

When, therefore, a final judgment of cancellation is rendered by the Commissioner, the entry in question is thereby canceled, and the land then becomes subject to appropriation under the provisions of the laws relating to public lands. A judgment is final as to the tribunal rendering it, when all the issues of law and fact, necessary to be determined, have been disposed of so far as that tribunal had power and authority to dispose of them.

In this case the judgment of your office of December 27, 1884, cancelling George G. Reed's entry was a final judgment, needing nothing outside or beyond it to render it effective. It completely canceled that entry so far as the rights of a subsequent entryman were affected thereby, and the time allowed for appeal was not necessary to open the land for entry. In such cases the proper practice would be to receive the application subject to the right of appeal, but not to allow the entry to be made of record until the rights of the former entryman have been finally determined, either by the expiration of the time allowed for appeal, or by the judgment of the appellate tribunal.

For the reasons herein set forth, I reverse your decision and direct that John H. Reed's application to make entry of said tract be allowed.

I find among the papers in this case, the appeal of Samuel M. Bennett from the decision of the local officers of June 22, 1885, rejecting his application of March 31, 1885, to make timber culture entry for this land. This appeal has not been considered in your office, and therefore the papers relating thereto are returned for proper action thereon.

RAILROAD GRANT—DEFLECTION FROM LINE OF DEFINITE LOCATION.

ROGERS v. ATLANTIC & PAC. R. R. CO.

The line of definite location, when fixed by the filing and acceptance of the map thereof, is the recognized standard by which the lateral limits of a grant are ascertained, and the grant adjusted.

Though the road as constructed may deflect from the line of definite location, such deflection does not change the location of the grant, or make it operative upon lands not affected by the line of definite location.

Secretary Vilas to Acting Commissioner Stockslager, March 2, 1888.

I have considered the appeal of the Atlantic & Pacific Railroad Company from the decision of your office, dated September 6, 1886, allowing Daniel Z. Rogers to make homestead entry of the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 25, T. 24 N., R. 33 W., in the Springfield land district, Missouri, and rejecting the claim of said company to the same. Concurring in the conclusion arrived at in said decision it is hereby affirmed.

In addition to the matters passed upon in that decision, on the appeal the company insists that, as a matter of fact, the land in question is without the six miles limits of the grant of 1852, but within the ten miles limits of the grant of 1866, and therefore passed to appellants as granted lands under the latter act; and permission is asked to file testimony showing the fact as alleged, and a diagram prepared by the officers of the company is presented, sustaining the allegation.

It is possible, as asserted, that "a space of more than six miles and a half intervenes between the land in question and the nearest approach thereto as finally located;" for the company may, at this particular point, have thought proper, in actually constructing the road, to deflect more than one half a mile from the line of its route as marked and located on the map of definite location, filed with and accepted by the land authorities. Such deflection, if it exist, cannot in any wise change the line of definite location when once fixed by the filing and acceptance of the map thereof. Thereafter said map becomes the recognized standard by which the lateral limits of the grant are to be ascertained and the grant adjusted. Neither the company nor the Department, nor both of them together have authority to change the line of definite location thus fixed; it can only be done upon legislative consent. *Van Wyck v. Kuevals* (106 U. S. 366). This being so, and the official map filed by the company and accepted by the Department showing clearly that the tract in controversy is within the six miles limits of the grant, under the act of 1852, as stated in your office decision, it would be useless to order a hearing, or afford the company further opportunity otherwise, to show that the land is more than six miles from where the company has thought proper to build the line of its road.

PRE-EMPTION ENTRY—RESIDENCE.

ISRAEL MARTEL.

The rule requiring actual residence of the claimant on the land for six months preceding entry, is for the purpose of testing the good faith of the claimant; but where the good faith of the settler is otherwise sufficiently established, temporary absences during any period of the settlement for the purpose of earning a living, not inconsistent with an honest intention to comply with the law, are accounted a constructive residence.

Secretary. Vilas to Acting Commissioner Stockslager, March 2, 1885.

By decision of February 16, 1886, you reversed the action of the local officers and rejected the final proof of Israel Martel, for the SW. $\frac{1}{4}$ of Sec. 12, T. 63 N., R. 11 W., Duluth, Minnesota, without prejudice to his right to make new proof of residence within the life time of his filing.

It appears from the evidence and you so find, that the claimant, a single man and qualified pre-emptor, settled upon the land and established residence thereon September 13, 1884, and that such residence was continuous up to April 1885; and that his improvements, valued at from \$250 to \$300, consist of a comfortable log house and two acres of land cleared.

You also find that between April 1885 and November 28, 1885 the claimant was temporarily absent a portion of the time to earn money to meet his expenses. From this you decide that "while claimant appears to have acted in good faith in the matter of improvements his residence on the land for six months preceding the date of application to enter, has not been such as the regulations of the office require." In other words, that while the acts of the claimant from the date of entry to the date of final proof, considered as a whole, have demonstrated the good faith of the entryman, and, evinces his intention to comply with the pre-emption law, yet his failure to maintain a continuous residence on the tract by actual occupancy—for the six months immediately preceding his entry, is sufficient to authorize the rejection of his proof.

From September 13, 1884 to sometime in April 1885, a period of about seven months, the claimant maintained an actual personal residence upon his claim improving the same. At the expiration of that period, he had fulfilled all the requirements of the pre-emption law, except as to the submission of proof and the payment of the money. Had proof been submitted at that time his entry would unquestionably have been approved for patent.

About that time, the claimant's means being exhausted, he obtained employment near his land from the United States deputy surveyor then engaged in surveying lands in the vicinity of the township in which his claim is situated. The deputy surveyor swears that, he employed claimant to watch his camp supplies and do the light work about camp; and that such employment required him to be with the surveying party

nearly the whole time from about May 1, 1885, the date of employment, to October 1885. He further swears that the claimant is a straight forward honest man, who was obliged to work because he had exhausted his means, and that while so employed he had no other home but his claim, which he always regarded as his home.

It is evident that claimant did not acquire any other residence during this period, and the circumstances of his employment do not show abandonment.

The rule requiring actual residence of the claimant on the land for six months preceding entry, is for the purpose of testing the good faith of the claimant; but where the good faith of the settler is otherwise sufficiently established, temporary absences during any period of the settlement for the purpose of earning a living, not inconsistent with an honest intention to comply with the law, will be accounted a constructive residence.

In this case the claimant appears to have complied with the requirements of the law, and I therefore reverse your decision and direct that the entry be approved for patent.

RAILROAD GRANT—HOMESTEAD ENTRY—ACT OF APRIL 21, 1876.

NILSON v. ST. PAUL M. & M. RY. CO.

An entry made within the limits of a railroad grant, at a time when the land was by the order of the Department subject to appropriation, is protected under the act of April 21, 1876, as against rights asserted under the grant.

The right to a patent under an entry thus made depends only on the settler showing due compliance with the law and regulations of the Department.

The establishment of residence within six months from date of homestead entry is not a specific statutory requirement, but a regulation of the Department, based on the provision in section 2297 of Revised Statutes, authorizing cancellation on proof of abandonment or change of residence for more than six months.

The poverty of the claimant, the condition of his family, and the severity of the climate, are matters entitled to consideration in determining whether due compliance with the law as to residence has been shown.

Secretary Vilas to Acting Commissioner Stockslager, March 2, 1888.

I have considered the case of Erick Nilson v. The St Paul, Minneapolis and Manitoba Railway Company, on appeal by the said company from your office decision of January 22, 1886, rejecting its claim to the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 25, T. 129 N., R. 41 W., 5th P. M., Fergus Falls land district, Minnesota, and confirming Nilson's homestead entry for said tract.

This tract is in the granted limits of the grant in aid of the construction of the St. Paul, Minneapolis and Manitoba (formerly St. Paul and Pacific, St. Vincent Extension) Railway. The map showing the definite location of said road was accepted by the Secretary of the Interior

December 19, 1871, and the lands were ordered withdrawn by letter of February 6, 1872, received at the district land office on the 15th day of that month. This order of withdrawal was revoked by letter received at the local office July 6, 1872. Afterwards this order revoking the withdrawal was rescinded and the lands again withdrawn.

In the meantime, on July 24, 1872, Erick Nilson made homestead entry for the tract in controversy; and on November 23, 1878, made final proof thereon before the local officers, showing his qualifications as an entryman under the homestead law; that he broke three acres in July, 1872, established his actual residence thereon April 30, 1873, and had lived there continuously from that time until date of final proof. His improvements at date of final proof consisted of a house begun in 1872 and completed in 1873; a stable, well, granary, and thirty-five acres fenced and in cultivation—all valued at three hundred dollars. He had raised six crops on the land. In a corroborated affidavit filed with the final proof, it is alleged that the claimant was poor, had no team to haul logs with, and had to work out to pay for the use of teams and also to support his family; that in November, 1872, his wife was taken sick and he was obliged to spend much of his time in taking care of her, and that as soon as she was able and he had a suitable place to move into he did move on to this land. The local officers forwarded this proof, calling attention to the fact that the claimant had not moved onto the land within six months after making entry, and recommending, in view of the explanation given, that the entry be allowed.

On December 19, 1884, your office requested that the St. Paul, Minneapolis and Manitoba Railway Company relinquish the tract in accordance with the provisions of the act of June 22, 1874 (18 Stat., 194), holding that although it was a case falling within the terms of the act of April 21, 1876 (19 Stat., 35), yet that did not prevent the company from relinquishing its claim and selecting indemnity under the act of June 22, 1874. The company declined to comply with the request.

On January 22, 1886, your office decided:

This is a case coming fairly within the intention of the first section of the relief act of April 21, 1876 (19 Stat., 35), the entry having been admitted after the restoration of the lands within the grant to market by order of this office, and so far as the claim of Nilson conflicts with the railroad grant, the entry is confirmed. With respect to Nilson's failure to go upon the land within six months from the date of his entry, the railroad grantee has nothing to do, it is a matter solely between him and the government,

stating that in the event of the decision becoming final the entry would be submitted to the Board of Equitable Adjudication.

It is contended on the part of the appellant that in order to entitle himself to the benefits of the act of April 21, 1876, the claimant must show not only that the entry was made at a time prescribed by the act, but also, that it was followed by a strict compliance with the homestead or

pre-emption law, and in this case, since the entryman did not establish actual residence upon the land within six months after the date of his entry, he cannot claim the benefits of said act.

I cannot admit the correctness of this contention. The entry was made at a time when the land was by the order of this Department, subject to appropriation under the homestead laws, and his rights as against the company were then established so as to be within the benefit of the act of April 21, 1876, and his right to patent depended only upon proof of compliance with the requirements of the homestead law, and the regulation of the Department. All this has been done except that it is now alleged he did not establish his residence thereon within six months from the date of his entry. This is not a specific requirement of the statute, but a regulation of the Department, in expression of the application, to the inception of the homestead right, of Section 2297 of the Revised Statutes, by which it is provided that if, at any time after the filing of the affidavit, it is proved, after due notice to the settler, to the satisfaction of the register of the land office, that the settler has actually changed his residence or abandoned the land for more than six months at any time, it shall revert to the government. This is the statutory foundation for the regulation of the General Land Office.

Under the facts of this case, it cannot be found that the statute, or, correctly applying it, the regulation, has been violated. The settler took the land in good faith to be his residence, he broke three acres within the first six months, and began the construction of his house. The completion of it during the year 1872 was interrupted by his poverty, and his inability to actually reside in it was due to the sickness of his wife. Considering his having actually transported his family to that house immediately upon the close of the winter in the following spring, and his continuous residence since, it ought to be held that his legal residence began (so far as to prevent any charge of abandonment) when he built his house and fixed that land as his home. That act, and his subsequent continuous residence, leave no reasonable doubt of the *bona fides* of his actual adoption of that land as his residence in 1872. It may as well be added that, under the circumstances stated, the severity of a north Dakota winter is a sufficient climatic reason to bring the case within the act of March 3, 1881 (21 Stats., 511), since it would have been unreasonable to require a sick wife to have been housed in the new home at an earlier date.

In this view, it does not appear to be necessary to refer the proof to the Board of Equitable Adjudication, because the statute cannot be held to have been violated so as to require equitable interposition to relieve against its rigor. The entry should be confirmed and the patent issued to the claimant.

Your office decision is modified accordingly.

PRE-EMPTION—TRANSMUTATION—SECOND FILING.

ORRIN C. RASHAW.*

The transmutation of a pre-emption claim to a homestead entry exhausts the pre-emptive right, and a second filing cannot be allowed in such a case although the homestead entry was subsequently relinquished.

Acting Secretary Muldrow to Commissioner Sparks, May 2, 1887.

I have considered the appeal of Orrin C. Rashaw from your decision of November 24, 1884, holding for cancellation his pre-emption cash entry on the W. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of Sec. 12, T. 18 N., R. 15 W., Grand Island, Nebraska.

Rashaw filed pre-emption declaratory statement on said tract January 9, 1883, and after notice made final proof before the clerk of the district court on February 2, 1884, which was approved by the register, and cash entry certificate issued to him February 20, 1884. At the time of making final proof, in response to the question, whether he had theretofore made a pre-emption filing, Rashaw answered that he had made such filing of the SE. $\frac{1}{4}$ of Sec. 28, T. 18 N., R. 14 W.

On March 3, 1884, the register and receiver by letter called the attention of your office to this answer, and stated that it had been overlooked by them and the final proof inadvertently approved. On receipt of this report, the records of your office were examined and disclosed that said Rashaw filed pre-emption declaratory statement for the last mentioned tract September 25, 1878, and made homestead entry thereof September 3, 1880, which was canceled on relinquishment November 22, 1882.

November 24, 1885, considering these facts, you held the cash entry for cancellation, because "claimant's right under the pre-emption law was exhausted by his first filing, and his second filing and the entry based thereon are illegal." From this action an appeal has been taken.

Claimant says that at the time of making his last pre-emption declaratory statement, which was made before the clerk of the district court, the latter was told of the former filing and inquiry made as to the validity of a second filing under the circumstances; and that said clerk informed claimant a second filing would be valid, inasmuch as no land had been obtained under the pre-emption law. Thereupon claimant moved with his wife and three children upon the land, resided on and cultivated the same, and in good faith complied with the requirements of the law; made final proof, which was approved by the register, and paid his money and received cash entry certificate. And claimant insists, in view of these equitable considerations, your action should be reversed.

These equitable considerations, which are presented with much force, by the counsel for claimant, would doubtless have due weight under other circumstances; but as the case now stands cannot be entertained.

* Omitted from Vol. 5.

As has been often held, claimant had the benefit of his one pre-emptive right when he made his first filing, and cannot now have another. That he did not consummate that right, but transmuted it into a homestead, which he subsequently relinquished, was his own voluntary act, for which neither the law, nor the Land Department is responsible. That he was deceived and misled by the erroneous advice of the clerk of the court is unfortunate, but the government is not bound by such advice, and this Department is not authorized, because an entryman has been misled either through ignorance or bad counsel, to suspend in his case the plain prohibition of the pre-emption law, against a second right thereunder.

Your judgment is affirmed.

MURDOCK *v.* HIGGASON.

On motion for review, Secretary Vilas March 6, 1888, revoked the departmental decision in the above entitled case, rendered July 18, 1887 (6 L. D., 35), and ordered a rehearing.

SCHOOL INDEMNITY SELECTION—DOUBLE MINIMUM LAND.

STATE OF CALIFORNIA.

An indemnity school selection for lands double minimum in price may be confirmed, in the absence of intervening adverse rights, where the lands were reduced in price prior to final action on such selection.

Secretary Vilas to Acting Commissioner Stockslager, March 8, 1888.

December 16, 1887, the Department recalled its decision dated November 30, 1887 (not reported), affirming the decisions of your office, dated respectively November 27 and 29, 1882, holding for cancellation certain indemnity school selections (therein specified), because the lands selected were double minimum in price.

Attention has been called to the fact that the lands though held to have been double minimum at the date of selection, have since been found to be single minimum; and it is therefore suggested that the decision of November 30, 1887, should be set aside and vacated.

Inspection of the records of your office discloses the fact that these lands were, at the date of selection included within the limits of the withdrawal for the benefit of the Atlantic and Pacific Railroad Company on the alleged line of the road from San Buenaventura to San Francisco.

By departmental decision, dated March 23, 1886 (4 L. D., 458), it was held that the Atlantic and Pacific Railroad Company never had a grant of lands from San Buenaventura to San Francisco, and accordingly all lands within the limits of said withdrawal (including the lands in con-

troversey), were thrown open to disposition under the general laws at the minimum price of \$1.25 per acre. These said facts were not before this office when the said decision of November 30, 1887, was rendered.

The said lands having been reduced in price prior to the final rejection of the State selections by the Department, said selections should be affirmed under the rule laid down in *Durand v. Martin* (120 U. S., 366). The court ruled in the case cited that, where a State school selection was invalid at the date of selection, if the objections to its validity had been removed prior to the date of certification over to the State, the selection would be held good. Upon this point the court say:

It is a matter of no moment that the selection was bad at the time it was made, if at the time of its presentation for title it was good, and there were no intervening rights to be injured by reason of its acceptance and ratification by the United States.

In this case there are no adverse claimants to any of the lands in dispute, and I am clearly of the opinion that the ruling of the supreme court referred to is applicable herein.

Upon authority of said case the decision of November 30, 1887, is set aside and vacated, and the selections in question will be approved.

DESERT LAND CONTEST—PREFERENCE RIGHT OF ENTRY.

HARPER v. O'BRIEN.*

A preference right of entry is accorded to the successful contestant of a desert land entry.

Nor can I concur in the view taken by counsel, that in omitting desert land entry from express mention in the act of May 14, 1880 (21 Stat., 140), providing for preference rights to successful contestants, Congress had intended that such privilege should not inure in contests against desert land entries.

Not only does the case of *Fraser v. Ringgold* (3 L. D., 69), (from which counsel dissent), expressly rule that desert land entries are in this regard within the reason, if not within the letter, of the act of May, 1880 (*supra*), but the 14th section of the circular approved by the Department and duly issued June 27, 1887 (5 L. D., 708), directs that:

Contests may be instituted against desert land entries for illegality or fraud in the inception of the entry, or for failure to comply with the law after entry or for any sufficient cause affecting the legality or validity of the claim. Contestants will be allowed a preference right of entry for thirty days after notice of the cancellation of the contested entry, in the same manner as in homestead and pre-emption cases, and the register will give the same notice and be entitled to the same fee for notice as in other cases.

See also *Jefferson v. Winter*, 5 L. D., 694.

*Extract from decision rendered by Secretary Vilas, March 10, 1888.

HOMESTEAD ENTRY—ADMINISTRATOR.

H. A. GALE.

There is no statutory authority under which an administrator may submit final proof and perfect the claim of a deceased homesteader.

Secretary Vilas to Acting Commissioner Stockslager, March 10, 1888.

I have considered the appeal of H. A. Gale, as administrator of the estate of William Kelly, deceased, from the decision of your office, dated July 24, 1886, rejecting the final proof offered by him on the homestead entry of said decedent.

The decedent, William Kelly, made said entry May 9, 1882, and died in October, 1885, and on March 15, 1886, the appellant, as administrator of the estate of said decedent, made proof upon said entry and presented the same at the local office for approval. The local office rejected the proof, on the ground that there was no claim made by the beneficiaries mentioned in the law, which ruling is sustained by the decision of your office.

It appears that William Kelly died intestate and left no widow or children, and that his heirs, if he have any, are unknown. The statute does not confer the authority in homestead cases upon an administrator to make proof and perfect the claim. Richard Clump (3 L. D., 384); Revised Statutes Sec. 2291.

The decision of your office is accordingly affirmed.

COMMUTATION PROOF—RESIDENCE.

NOAH HERRELL.

The regulations governing the period of residence required in case of commutation are for the purpose of securing an assurance of good faith on the part of the entryman; but where good faith is clearly apparent, and a substantial compliance with the regulations is shown, exceptions are justified, especially under those requirements which govern the manner of proof but do not affect its quality.

An entryman who was qualified and prepared to commute, but through misinformation received at the local office, submitted ordinary homestead proof, which was found insufficient as to the period of residence, may be permitted to commute, although the residence shown will not cover the six months immediately preceding final entry.

Secretary Vilas to Acting Commissioner Stockslager, March 10, 1888.

I have considered the appeal of Noah Herrell from your decision bearing date of July 10, 1886, rejecting his petition to have his final proof accepted as having been made under Section 2301, U. S. Revised Statutes.

On June 12, 1883, claimant filed homestead application No. 10,939, in the Land Office at Camden, Arkansas, for the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 13 T. 9 S., R. 21 W., containing eighty acres.

On November 14, 1884, he made final proof before the register and receiver, which was approved by them, and final certificate No. 3477 issued thereon.

In making said proof claimant testified that his age was forty years; was married, his family consisting of his wife and four children, and that he with his family, resided continuously on the land since January 29, 1883; that his improvements consisted of one two story frame house, sixteen by thirty-two feet, and one other, fourteen by sixteen feet; a stable, and a well; that he cultivated fourteen acres two seasons, but he does not state the value of such improvement.

On August 17, 1885, your office suspended claimant's final certificate, "for the reason that the proof is prematurely made", and as "it appears from a statement furnished by the War Department that the settler only served two years in the army during the late war, which added to the time he has resided on his claim will not make the five years required by law he will be required to continue residence on and cultivation of the land for such a period as, with his military service, will aggregate five years, and at the expiration of that period he will be required to furnish new proof."

Sometime in the spring of 1886, Herrell filed a sworn petition in your office, in which, among other things, he alleges:

I established residence on the land January, 1883, and owing to continued sickness of myself and family, after residing on the land nearly two years, I went to Camden for the purpose of commuting my entry, or paying the government price therefor; but upon the advice of the register, Mr. Mallory, who stated that I was entitled to credit for military services of over three years, I gave the required notice for making the usual ordinary final proof I served in the army from July 29, 1863, to March 3, 1864, when I re-inlisted for three years, and served from March 28, 1864, to July 25, 1865, when I was mustered out with the regiment. I acted in perfect good faith in the premises, and followed the advice of an officer of the government in making proof as above stated, and had I known that I was not entitled to credit for my full term of enlistment, in the last organization, I would have perfected my entry under Section 2301 U. S., Revised Statutes. As my health is such as to render it impossible for me to return to the land and complete the required term of residence, I respectfully request and pray that the proof heretofore submitted be considered as having been made under Section 2301, and that I be permitted to pay government price for the land and thus secure title thereto, and save the valuable improvements made thereon.

July 10, 1886, after considering said petition, you held that: "The law requires the proof in commutation as in pre-emption cases, that is, that the party is residing on the land at date of making proof and payment, and has been, with the proper cultivation, for at least six months

immediately preceding, before commutation can be allowed", and therefore decided to adhere to the former adverse decision.

The regulations governing the period of residence required in case of commutation, like those under the pre-emption law, are for the purpose of securing an assurance of good faith on the part of the entryman; but where good faith is clearly apparent, and a substantial compliance with the regulations is shown, an exception may be justified, especially under those requirements which govern the manner of the proof, but do not affect its quality. Joseph Hoskyn (4 L. D., 287).

If the allegations of the entryman are true he was only prevented from submitting commutation proof through the misinformation received from the local officers, without any intended fault, or wrong either on his part or theirs. And as it appears that he was then qualified in all respects and properly prepared under the regulations to make commutation, I am of the opinion that he should be given an opportunity to establish the truth of said allegations.

You will therefore direct the local officers to call on the claimant to submit supplementary proof duly corroborated in support of said allegations, and make payment for the land. When such proof is submitted you will pass on the same as in other cases.

ADDITIONAL HOMESTEAD—ACT OF MARCH 3, 1879.

JOSHUA WELCH.*

The right to make a new, or additional homestead entry, under the act of March 3, 1879, is limited to those who had taken eighty acres, and remained in possession thereof, residing upon and cultivating the same, at the date of the passage of said act.

Acting Secretary Muldrow to Commissioner Sparks, April 8, 1887.

I have considered the appeal of Joshua Welch from your office decision of December 2, 1885, rejecting his application to enter under the provisions of the act of March 3, 1879, the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, and the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, of Sec. 18, T. 20 N., R. 42 E., Spokane Falls, Washington Territory.

Welch, on April 1, 1872, made homestead entry for the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 6, T. 3 N., R. 17 E., Vancouver district, Washington Territory. This entry was canceled for voluntary relinquishment November 6, 1874. March 3, 1879 (20 Stat., 472), an act was passed providing that:

Any person who has, under existing laws, taken a homestead on any even section within the limits of any railroad or military road land-grant, and who by existing laws shall have been restricted to eighty acres, may enter under the homestead laws an additional eighty acres

* Omitted from Vol. 5.

adjoining the land embraced in his original entry, if such additional land be subject to entry; or if such person so elect, he may surrender his entry to the United States for cancellation, and thereupon be entitled to enter land under the homestead laws the same as if the surrendered entry had not been made.

Welch claims that, having "taken a homestead on an even section within the limits of a railroad grant," and having "surrendered his entry to the United States for cancellation," he comes within the letter and spirit of the statute, and is now entitled, under the last clause above quoted, to enter one hundred and sixty acres of land, "the same as if the surrendered entry had not been made."

Upon a careful reading of the entire act, nothing can be more clear than that Congress in passing the act of March 3, 1879, had in view only those who had taken eighty acres, and who remained in possession thereof, residing upon and cultivating the same, at the date of the passage of the act. Welch having, when this statute was enacted, no homestead claim in existence, there was no foundation for a claim of an additional homestead. I therefore affirm your decision.

PHILLIPS v. CENTRAL PAC. R. R. CO. (OREGON BRANCH).

Motion for reconsideration of the departmental decision rendered in the above entitled case December 7, 1887 (6 L. D., 378), overruled by Secretary Vilas, March 15, 1888.

PRE-EMPTION ENTRY—RESIDENCE.

WILLIAM A. THOMPSON.

"Inhabitaney" is not impeached, after residence is once secured, by absences necessary to secure means for the improvement of the land and the payment of the purchase price.

Secretary Vilas to Acting Commissioner Stockslager, March 15, 1888.

I have considered the appeal of William A. Thompson from your office decision of July 9, 1886, rejecting his final proof for the land therein mentioned. I think this man is entitled to his patent. He made his declaratory statement April 26, 1883, alleging settlement the week before, and shows that he made it. It appears that he was absent during most of the following summer, that he was on the land from fall until the following spring, absent again during the succeeding summer, again upon the land from fall until spring, and not absent six months at any one time; that he applied the proceeds of his labor during the two seasons when he was absent to the building of his house and the making of improvements upon his land, now valued altogether at six hundred dol-

lars; that he was a poor man, and his absence was for the purpose of earning the means to improve his land, and that he devoted all the fruits of his earnings with fidelity to that purpose. In the spring of the third year, he left again and remained absent until the following January, his purpose being to earn sufficient money to pay the government for his land. The amount necessary was two hundred dollars, a considerable sum for a laborer to save from his wages during the year, in addition to the necessary fees and expenses. He appears to have done it, and notwithstanding he was not personally present upon his land during the last six months preceding the completion of his entry, the fact cannot deny his right. He made "a settlement in person" on this land, he has erected a dwelling thereon, he has improved the land, and he has inhabited it in good faith. When it is considered that this tract was situated many miles from the ordinary highways, remote from settlements generally, that it is very difficult of access, and yet that he has persistently clung to it for three years, applying all the results of his labor to its improvement and its purchase, it is difficult to discern a case more worthy of being found marked by good faith. His "inhabitaney" of the land is not impeached after his residence was once secured, by his going abroad to procure means to bring back there to improve it and obtain title to it.

I must reverse your decision and direct a patent to issue to the claimant.

PRE-EMPTION ENTRY—RESIDENCE.

B. F. HEASTON.

The fact that the wife continues to reside at the former residence, apart from her husband, does not prevent him from establishing and maintaining a residence at another place. Such fact merely raises a presumption against the *bona fides* of the change of residence that may be rebutted by proof.

Secretary Vilas to Acting Commissioner Stockslager, March 15, 1888.

By decision of February 5, 1886, you rejected the final pre-emption proof of Benjamin F. Heaston, for the NW. $\frac{1}{4}$, Sec. 2, T. 7 S., R. 33 W., Oberlin, Kansas, upon the ground that all of his family did not reside on the claim with him, although the proof was satisfactory in all other respects.

It is shown by the proof, as stated in your decision, that Mrs. Heaston is an invalid living in Doniphan County, Kansas, on her own land to which her husband has no right or title. She absolutely refused to live upon the claim, alleging it to be impossible for her to move from her present home being confined to her bed most of the time.

It appears that Heaston and his eldest daughter have resided on the claim continuously since his settlement, and that he has placed substantial improvements thereon. The proof shows, and you so find, that

the entryman has complied with the law in all other respects, save that the refusal of his wife to live upon the claim with her husband contradicts and impeaches the bona fides of his residence on the claim. The fact that his wife continues to reside at the former residence, apart from her husband, does not prevent the husband from establishing and maintaining a residence at another place. It is simply a presumption against the bona fides of the change of residence that may be rebutted by proof.

The evidence does not impeach the bona fides of the entryman as to residence upon the claim. His wife is an invalid with six small children. She is confined to her bed most of the time and requires medical attendance that she could not get on the claim. The entryman swears that he has no other place of residence except on the claim, and is trying to make such a home thereon as will induce his wife to live with him on the claim.

Your decision is reversed and the entry approved for patent.

BLODGETT v. CENTRAL PAC. R. R. CO. (OREGON BRANCH).

Motion for reconsideration of the departmental decision rendered in the above entitled case November 5, 1887 (6 L. D., 309) overruled by Secretary Vilas, March 15, 1888.

TIMBER CULTURE CONTEST—SUFFICIENCY OF CHARGE.

WARD v. ROBINSON.

The allegation that "the land is of the class that will not produce timber" is not a good ground of contest.

Secretary Vilas to Acting Commissioner Stockslager March 15, 1888.

On January 14, 1884, John A. Robinson made timber culture entry for the NE. $\frac{1}{4}$ of Sec. 22, T. 5 S., R. 14 E., Stockton, California.

On May 27, 1885, John L. Ward initiated contest, alleging that claimant "did not cultivate five acres of land the first year as required by law nor has he cultivated five acres the second year, and has sown no crop whatever, and that said land is of the class that will not produce timber."

As contest was initiated within one year and five months after entry, the only default put in issue was that of the first year. The local officers find that five acres were broken in that year and your office sustains that finding. I concur in said finding, after a careful review of the testimony.

The allegation that "the land is of the class that will not produce timber" is not a good ground of contest. That question must await the attempt of the entryman to comply with the law.

It was claimed by contestant that timber will not grow without irrigation, and that this land is too high to be irrigated.

Said decision of June 4, 1886, is affirmed.

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TIMBER CULTURE ENTRY—RELINQUISHMENT.

KEARNEY v. ALDEN ET AL.

Though action on a relinquishment is delayed, pending submission of proof required as to the identity of the party executing the same, it takes effect as of the date when filed.

Secretary Vilas to Acting Commissioner Stockslager, March 15, 1888.

On April 25, 1882, David R. Alden made timber culture entry for the SW. $\frac{1}{4}$, Sec. 22, T. 143 N., R. 65 W., Fargo, Dakota.

On April 25, 1885, Frank E. Clark presented to the local officers at Fargo a relinquishment of said entry, and at the same time offered his own application to enter said tract under the timber culture law.

Said relinquishment was duly executed by William H. Alden as "sole and only heir of David R. Alden, deceased."

The relinquishment and application were received by the local officers and deposited in the local office to await evidence of the death of the entryman and the heirship of William H. Alden. This evidence the applicant was instructed to procure and furnish. The tender of the relinquishment and application with the proper fees was noted on the register of timber culture entries. On June 2, succeeding documentary evidence of the entryman's death was filed, and on the 9th day of the same month proof of the heirship of William H. Alden was received and filed.

Pending these proceedings and on the 19th day of June, 1885, Edward T. Kearney applied to contest said timber culture entry, alleging failure to comply with the law.

On August 6, 1885, the local officers declared said timber culture entry, 6829, canceled, allowed the entry of Clark, and dismissed the contest of Kearney.

Your office, by letter of December 8, 1886, approved of the action of the local officers. Kearney appealed.

After a careful examination of the record I am satisfied that said disposition of the case is the proper one. Under the act of May 14, 1880, a relinquishment takes effect when filed. The relinquishment in this case was in all respects valid when deposited in the local office. The delay in completing the record was owing to the demand by the local officers, of proof of the identity of the party signing the paper. This same delay might have occurred had the original entryman filed a relinquishment and proof of identity been demanded of him. And yet in that case it seems clear the relinquishment would operate from the date of its presentation.

Said decision is accordingly affirmed.

PLACER MINING CLAIM—SURVEY.

G. A. KHERN.

The official plat and field notes of survey of a placer claim on surveyed land, may be properly required, where it is impracticable to accurately designate the land included within such claim.

Secretary Vilas to Acting Commissioner Stockslager, March 17, 1888.

I have considered the appeal of Gustavus A. Khern from the decision of your office, dated March 23, 1886, requiring claimant to furnish the official plat and field notes of survey of the E. $\frac{1}{2}$ of Lot 6, W. $\frac{1}{2}$ of Lot 7, in Sec. 15, T. 9 N., R. 2 W., covered with other tracts, by mineral entry No. 1054, made December 18, 1883, for his placer claim by said Khern, at the Helena land office, in the Territory of Montana.

Your office required claimant to furnish said plat and notes of survey, because said lots, as shown by the approved township plat of survey, are rendered irregular in their exterior boundaries by the prior location and survey of the placer claim of Samuel T. Hauser, Lot No. 38, mineral entry No. 112, and of the placer and lode claim of said Khern, known as Lot 1, mineral entry No. 89, and, therefore, they can not be subdivided into halves, so as to fix, definitely, the exact boundary lines of such halves, by a mere reference to said township plat of survey.

The only ground of error alleged by the appellant is, that the decision of your office is in direct conflict with the provisions of section 2331 of the U. S. Revised Statutes.

Said section provides that, where placer claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer mining claims located after the tenth day of May, 1872, shall conform, as near as practicable, "with the United States system of public land surveys," and the rectangular subdivisions of such surveys; and no location shall include more than twenty acres for each individual claimant, but where placer claims can not be conformed to legal subdivisions, survey and plat shall be made as on mineral lands.

In the case of S. F. Mackie (5 L. D., 199), this Department, construing said section (*inter alia*), held that the purpose of the requirement of plats in certain cases was to inform the Land Department, as well as conflicting locators or protestants, of all the material facts concerning the claim which can be shown by plat and field notes.

In the case at bar, your office finds that it is impracticable to designate accurately the land applied for, on account of the interference of other claims, and that the claimant should furnish the official plat and field notes of survey of the parts of said lots claimed, as required by section 2325 of the Revised Statutes. This requirement, instead of being in conflict with the provisions of said section 2331 of the Revised Statutes, is, in my judgment, in entire harmony therewith.

Said decision is accordingly affirmed.

RAILROAD GRANT—TERMINAL LIMITS—ADJUSTMENT.

UNION PACIFIC RY. CO. (ON REVIEW).

The order of December 7, 1887, restoring to entry the odd numbered sections, not certified or patented, lying south of the terminus of the Denver Pacific, and west of the terminus of the Kansas Pacific, at Denver, Colorado, is vacated, and the withdrawal of said lands held intact; but no further patents or certifications will be issued or allowed, or selections approved to said companies for lands within said area.

Secretary Vilas to Acting Commissioner Stockslager, March 17, 1888.

An application is made to me to review the decision of this Department, communicated to you by letter of December 7, 1887 (6 L. D., 385), to the effect that the lands being within certain odd-numbered sections, situated southwest of Denver in the State of Colorado, and south of the terminus of the Denver Pacific Railroad, and west of the terminus of the Kansas Pacific Railroad, as the terminals of such grants are adjusted in the Department, were not properly to be patented to the Union Pacific Railway Company or to either of said railroad companies, but that they belong to the public domain, and directing a demand for reconveyance, so that thereafter suit shall be brought under the act of March 3, 1887 (24 Stat., 556), to set aside such patents to some of the lands as have been issued, and restoring to entry in accordance with existing laws and regulations all odd-numbered sections within the designated boundaries not certified or patented.

The right of the railroad claimant or claimants to these sections appears to depend upon the proper interpretation of the act of March 3, 1869 (15 Stat., 324). The decision under review determined that this act separated the former alleged continuous grant into two distinct and independent grants, requiring only that the two roads to be built should be connected for operating purposes at Denver. It is insisted that, under the first granting act, the line of road was continuous and the grant of lands also continuous; that the grant was *in presenti* and the title vested in the Union Pacific Railway Company; and that no default authorized an act of reverter or reclamation of the title. It is, perhaps, enough to say in respect to these points that the act of 1869 was a law as well as the first granting act, and that the intention of Congress, as manifested in the latter act, must prevail, because, whatever might be the doubts otherwise, the act of 1869 was accepted by the Union Pacific Railway Company and its benefits and advantages derived under that acceptance must be taken with the burdens of whatever change in Congressional purpose the act of 1869 established. In respect to the proper interpretation of this governing act, there may be room to say it is not entirely free from doubt, but I am not disposed to admit the doubt, nor to discuss the question, in view of the clear determination of the point by the Department under my predecessor, and because in no other way

can the rights of the government be satisfactorily determined and enforced. You will, therefore, make the demand previously directed and report thereon.

But the concluding sentence of the communication to you of December 7th, directing that "odd sections within said area, not certified or patented to said company, will be restored to entry in accordance with existing laws and regulations," must be qualified. Instead of restoring them to entry, the direction is that no further patents or certifications or selections shall be issued, allowed or approved to the first named railroad company or either of them, or any one claiming under them; that the subsisting withdrawal from entry under existing laws and regulations by private parties remain undisturbed until the further order of the Department.

It appears that after the first grant was made, the Department approved a location of a line as a continuous line of road, and of the land grant as continuing through the disputed lands adjacent thereto; that the instructions to the register and receiver went accordingly; that after the passage of the act of 1869, the attention of the General Land Office not having been, apparently, drawn to the effect thereby produced upon the grant by its severance into two grants, other instructions and action continued upon the same theory of a continuous grant; a theory more strongly evidenced still by the issuance of patents to some of the odd-numbered sections within these limits. It is probable, indeed, that this action was taken by the Land Office without any consideration of the point involved, which passed *sub silentio*, and may, therefore, be reviewed without injustice, certainly as between the government and the railroad company. But such acts of recognition on the part of the Land Office may have contributed to give confidence to purchasers from the railroad company, because it is represented that the company has made grants to the extent of some 38,000 acres altogether, of lands, some of which had been patented, some only selected, and some neither patented nor listed for selection in the Land Office. It is also represented that many occupants of these lands have held them as private property for a considerable number of years by virtue of such conveyances; that in many cases valuable improvements have been put upon them, and that the value of the lands has very considerably changed. As to these, and perhaps, equally as to all those which the railroad company has not yet sold, to open them to market, while the title is in litigation, would be to expose every person who made an entry to all the risks of the litigation about to be entered upon, whatever they may be. If the government could anticipate a favorable judicial decision with unerring forecast, the duty of restoring the lands to entry under existing laws would be obvious. It does not appear to be wise administration to take that course in advance of a judicial determination in favor of the government. The lands will be

more valuable with lapse of time, no inconvenience appears likely to occur from their remaining *in statu quo*, while it is obvious that not only would the present settlers who bought in good faith be involved in litigation concerning the occupied lands, but the unoccupied lands would be probably taken up either by daring speculators, or those not fully aware of the risks involved. By leaving the question of a revocation of the withdrawal at the discretion of the Department, such action as the public interests may require may at any time be taken, and it is not improbable that the true course of the Department when the title is fully settled, will be to offer the lands at public sale. It is said that the decision of the cause can be expedited, the railroad company averring its desire for an early decision. If the determination be protracted, so that a better reason for the revocation of the withdrawal shall be presented than now exists, the course remains easily open to the Department.

SURVEY—ISLAND—RIPARIAN RIGHTS.

FRANK CHAPMAN.

Proprietors, bordering on streams not navigable, unless restricted by the terms of their grant, hold to the center of the stream.

The survey of an island, in a stream not navigable, must be denied, where *prima facie* the island belongs to the proprietor of the land on the nearest main shore opposite said island, and such survey would be an interference with vested rights.

Secretary Vilas to Acting Commissioner Stockslager, March 20, 1888.

I am in receipt of your letter, dated January 28th last, transmitting for departmental action the application of Frank Chapman for the survey of an island situate in the Arkansas river, in Sec. 2, T. 26 S., R. 29 W., Garden City land district, Kansas.

With said application are the affidavits in due form as to the condition, location, elevation, etc., of the island; also affidavits of service of notice upon the parties owning the lands opposite and nearest thereto on the main land.

You submit with your report a copy of the official plat of the original survey of the township in which the island is situated. Said plat shows the meander of the river through the township, and through section two. It also shows that no island is indicated in said section two, while the diagram furnished by the applicant shows two small islands in the Arkansas river in said section.

These islands are in close proximity to each other, but the application has reference only to the larger, which, it is stated, contains about nine acres, and would be valuable for gardening.

The evidence shows that between the island and the main land, the channel on the south side has a width of about seven hundred feet;

while that on the north side is about three hundred and fifty feet wide, each having a depth at ordinary stages of water, of about three feet; also, that the two islands are distant from each other, at ordinary stages of water about one hundred and twelve feet, the water between them having a depth of about one foot.

The county surveyor of Ford county states that he will make a survey of both islands for ten dollars, if so instructed by your office, and you recommend that the application of Chapman be granted.

Upon a careful examination and consideration of the matter as presented, I am led to the conclusion that the application for survey should not be granted, and I cannot, therefore, approve your recommendation.

It does not appear that the Arkansas river, or that portion of it in Kansas, is navigable, and the riparian rights of the owners and proprietors of the lands on either of its shores must be duly regarded in connection with an application like that under consideration.

In such case, in the absence of any statutory provision to the contrary, the common law right of the riparian proprietor on either shore to the bed of the river *ad flum aquæ* should not be ignored. The supreme court of the United States recognized this common law rule in the case of *Railroad Company v. Schurmeir* (7 Wall., 272). In that case, referring especially to the act of Congress approved May 18, 1796, (1 Stat., 464) which made provision for the survey and sale of lands northwest of the Ohio river and above the mouth of Kentucky river, the court said, according to the syllabus, (which seems to correctly state the substance of the decision on this point), that—

Congress, in providing as it does in one or more acts relating to the survey and sale of public lands bordering upon rivers—that navigable rivers, within the territory to be surveyed, should be deemed to be public highways, and that when the opposite banks of any stream, not navigable, should belong to different persons, the stream and the bed thereof should become common to both—meant to enact that the common law rules of riparian ownership should apply in the latter case, but that the title to lands bordering on navigable streams should stop at the stream, and not come to the *medium flum*.

Following this rule as above stated, the court in the body of the decision, say that, "Proprietors, bordering on streams not navigable, unless restricted by the terms of their grant, hold to the centre of the stream."

Without here deciding in express terms where the title to the island to which this application relates now rests, I am of the opinion that, under the rule just enunciated, it would not be advisable to order the survey as asked, since *prima facie* the island belongs, under the law of riparian rights, to the proprietor, or proprietors of the land on the nearest main shore opposite said island, and if it does so belong, to order the survey and sale would be to interfere with vested rights.

The application is accordingly denied.

MILITARY RESERVATION—TIMBER CULTURE ENTRY.

JOHN C. IRWIN.

Land reserved by competent authority is not subject to appropriation, under the public land laws, during the existence of such reservation.

That the records in the local office did not disclose the existence of the reservation, and, in consequence of such fact, the land was entered and great expense incurred, will not legalize such an entry, or authorize the issuance of patent thereon.

Secretary Vilas to Acting Commissioner Stockslager, March 24, 1888.

B^r letter of June 23, 1886, you informed the register and receiver of the land office at Brodie, California, that the timber culture entry, No. 66, made by John C. Irwin, January 11, 1886, was invalid, and you directed said officers to so notify Irwin, and that his entry was held for cancellation.

Lots one and two of the NE. $\frac{1}{4}$ of Sec. 4, T. 13 S., R. 35 E., Mount Diablo Meridian, California, is the land embraced in said entry.

From a copy of an order issued January 23, 1866, by Andrew Johnson, President of the United States, it appears that, among other lands, all of said Sec. 4 was "set apart and reserved" for military uses, more especially for grazing purposes for Camp Independence military post. Because so reserved, you hold said entry to be illegal and that it should be canceled.

The objections urged to said decision on appeal are :

1st. That no plat or record of the Brodie land office shows said land to be in said military reservation, and that it was never, to the entryman's knowledge, used by the government as a part of said reservation.

2d. That no objection was made by the local officers to said entry ; that the register reports that the records of his office show no reservation of said land ; that the entry was made in good faith, and that large sums of money have been expended in cultivating and improving said land.

It is not shown, nor is there any pretense made that said military reservation has been abandoned by the government, or that said executive order has been wholly or partially revoked, and certainly, until such abandonment or revocation can be shown, it can not properly be held that said land is subject to entry under the timber culture law.

This land, having been reserved for public use by competent authority, the fact that such reservation was not shown by the records of the local land office, and in consequence thereof was entered and large expense incurred thereon by the entryman, can not make such entry legal, nor empower the land department to dispose of such reserved land by giving its sanction to such illegal entry.

An entry improperly allowed, not only by the local officers, but by the Commissioner of the General Land Office, will be canceled when the fact is properly brought to the attention of the head of the land department. (Charles W. Filkin, 5 L. D., 49.)

Your decision is affirmed.

PRIVATE CLAIM—RES JUDICATA—ACT OF JUNE 13, 1812.

JEAN B. HERVIEUX.

Confirmations under the act of June 13, 1812, were by virtue of inhabitancy, cultivation, and possession, and not by virtue of concession; and such confirmations were valid as against all claims except those previously confirmed by the board of commissioners.

The award of the tract herein claimed to another and the execution of such decree, precludes further departmental action with respect to the title thereto.

Secretary Vilas to Acting Commissioner Stockslager, March 27, 1888.

On October 23, 1883, E. T. Farrish, trustee, filed in your office an application for the survey of a tract of land, two by forty arpens, in what is known as the "Grand Prairie Common Fields of St. Louis", alleged to have been conceded to Jean Baptiste Hervieux, by the French government December 30, 1766, and confirmed by act of Congress, approved April 29, 1816 (3 Stat., 328).

You refused to grant said application, upon the ground that the representatives of Hervieux have not shown that the land for which they now ask a survey, was the land to which any confirmation in their favor attaches.

Applicants filed a motion for review of said decision and by letter of October 30, 1885, after an elaborate statement of all the facts, you adhered to your former decision.

By reference to Private Land Book, Vol. 1, page 17, it appears that a concession was made to Hervieux, of an unplatted tract of land, two by forty arpens in the "Out lot fields St. Louis". Under the act of March 2, 1805, Hervieux, or his representatives were entitled to confirmation of such title upon complying with the provisions of the act as to proof, etc. It does not appear that Hervieux, or his representatives, ever made application for confirmation of this concession, but under the act of June 13, 1812, providing for the confirmation to settlers by reason of cultivation, inhabitancy and possession alone, and not by virtue of a former concession. Recorder Bates, having his attention called to concessions recorded in Land Book No. 1, pages 1 to 35, inclusive, considered all of said concessions as having been formally presented for confirmation, and took testimony in regard to the same; although it does not appear that the original claimants or their representatives, applied for confirmation of such claim.

The original claimants, or their representatives, were entitled to confirmation by virtue of the concession, under the act of March 2, 1805 (2 Stat., 324), but the act of June 13, 1812 (2 Stat., 748) only provided for the confirmation of claims by virtue of inhabitancy, and cultivation prior to December 20, 1803, and the concessions referred to by Recorder Bates in his report appearing in the Land Book, only served to indicate that persons whose concession were therein recorded, and which had

never been confirmed, would be entitled to confirmation of such claims as they possessed and cultivated prior to December 20, 1803, irrespective of their claim to said tract by virtue of a concession, because the receiver had no authority for confirming village lots because of a concession, but solely on the ground of inhabitancy, possession and cultivation prior to December 20, 1803, which were the only requisites to a confirmation under the act. Page *v. Scheibel* (11 Mo., 167); *Guitard v. Stoddard* (16 Howard 494).

It was evidently the intention of the act to provide for the confirmation to persons of the tracts occupied and cultivated by them at the date of, and prior to December 20, 1803.

As the act of June 13, 1812, provided that "nothing herein contained shall be construed to affect the rights of any persons claiming the same lands or any part thereof, whose claims have been confirmed by the board of commissioners for adjusting and settling claims to land in said territory", it would seem to be the intention of the act that a confirmation by reason of inhabitancy, cultivation and possession, should defeat a concession for the same land, if such concession had not been previously confirmed by the board of commissioners.

No confirmation had been made to Hervieux or his representatives, for any tract of land under said concession, but Recorder Bates reported among others, the following claims for confirmation under the act of June 13, 1812.

[Concession Warrant or order of Survey and by whom. Provincial Land Book 169]

Survey	Not platted.
Claimants name	Hervieux Representatives.
Quantity claimed.....	2 by 40 arpens.
Situation	Out lot fields St. Louis.
Acts of ownership.....	Possession and cultivation prior to 1803.
Opinion of the Recorder	Confirmed 80 arpens to be surveyed.

A similar report was made in favor of Calve's representatives, except that the situation was described as "Out Lot B. Prairie St. Louis".

By act of April 29, 1816, Congress confirmed all claims recommended for confirmation by Recorder Bates in his report of February 1816 (3 Stat., 328).

Under the confirmation to Calve's representatives a survey was made under the direction of the surveyor general of two tracts, 2 by 40 arpens each, being a mile distant from each other and numbered 1583 and 3309 respectively. Survey 1583 was approved as the correct survey of the land confirmed to Calve, by reason of his occupancy and cultivation of the tract at the date of, and prior to December 20, 1803; and survey 3309 was rejected and treated by the surveyor general as null and void for want of confirmation.

It is contended by the representatives of Hervieux that the tract designated as survey 1583, is the same tract that was confirmed to Hervieux, upon the report of Recorder Bates. But as before stated, the

claims reported by Recorder Bates, under the act of 1812, were confirmed upon the ground of inhabitancy, cultivation and possession alone, and not by virtue of concession; and such confirmations were valid as against every one except persons whose claims to the same tract had been previously confirmed by the board of commissioners for adjusting and settling claims to land in said territory. Therefore, as Hervieux' claim to this tract under his concession had not been confirmed prior to the act of June 13, 1812, it will not defeat the confirmation to Calve, by reason of cultivation, inhabitancy and possession at the date of and prior to December 20, 1803.

The history of the confirmation of title to this tract is fully set out in the decision of Acting Secretary Muldrow of September 15, 1886, upon the application of Charles P. Chouteau, *et al.*, for the approval of Survey 3309, as the tract confirmed to Calve's representatives, and also in the decision of Secretary Lamar of January 6, 1888, on review. (6 L. D., 462-467.)

In the decision of September 15, 1886, (6 L. D., 464) the Acting Secretary said :

While it may be true that the land covered by this survey was the land conceded to Hervieux, and that a village lot was confirmed to him under the act of June 13, 1812, there is no evidence that he was occupying and cultivating this lot prior to 1803, or claiming it in any manner whatever, nor is there any evidence that Calve was not the last inhabitant occupying and cultivating it prior to December 20, 1803. I think it may also be safely assumed that Calve had inhabited, occupied and cultivated the tract known as survey No. 1583 prior to December 20, 1803.

By decision of your office of March 28, 1885, the application of Hervieux representatives for a survey of the tract of land 2 by 40 arpens in the city of St. Louis, being the tract of land referred to in *Livre Terrien*, No. 1, page 9, was rejected upon the ground that actual possession, inhabitancy or cultivation of the land for which survey is asked had not been proved, and hence the confirmation did not attach to this land until such proof was furnished.

In passing upon the application for review of this decision by letter of October 30, 1885, you conclude :

After the lapse of nearly a century since the possession, cultivation, etc., which was the basis of title, (and in my opinion the proof strongly preponderates to show that Calve and his representatives were the actual possessors and cultivators of the land), and after the determination and action of the surveyor general in 1845, approving survey No. 1583, in favor of Calve and his legal representatives as the confirmees of such title; and in view of the confirmatory act of 1874; an interference on my part *now*, the effect of which would be to invite litigation and disturb rights vested by such formal adjudication and held in long possession to property made valuable and become a portion of a large city, would not, I think be a justifiable exercise of discretionary power, if I possessed such power, which as before shown, I am satisfied I do not possess. The remedy, if any, must, in my opinion, now be sought elsewhere.

Considering fully the facts of this case as presented by the record ; and the fact that no application for the survey of this tract under the confirmation to Hervieux had been made until the survey of lot 1583 had been surveyed and approved by the Department as the tract confirmed to Calve, and in view of the action of the Department, holding that survey 1583 was the land confirmed to Calve ; and the further fact that the land claimed to be the tract confirmed to Calve has already been surveyed, I concur in your opinion that the rights of these applicants, if they have any in the premises, must be determined by the courts, and I affirm your decision.

RAILROAD GRANT—ADJUSTMENT—SUIT TO VACATE PATENTS.

THE BURLINGTON & MO. RIVER R. R. CO.

The act of July 2, 1861, authorizing the Burlington and Missouri River Railroad Company to extend its line through Nebraska, contemplated that one half of the land granted should be taken on each side of the road, and there is no authority for enlarging the quantity on one side to make up a deficiency on the other.

In the institution of proceedings to vacate patents for lands taken in excess on one side of the line, in lieu of deficiencies on the other, the lands thus patented in excess of the company's rights must be carefully distinguished.

As the right of selection is limited to the alternate odd numbered sections, lying nearest to the line of located road, the lands taken in excess, on the north side of said line may be identified by adjusting the grant so that the company will receive nowhere along the line, lands to the north of a line parallel with the line of the road, south of which any alternate odd numbered sections, subject to the grant, may remain unselected.

The joint resolution of 1870, authorizing a change in the line of the road, provided that "said change shall not change the location of the said land grant, and the said company shall receive no different, or other, or greater quantity of land than if this act had not been passed, and no change had been made, in the located line of said railroad ;" hence, in the adjustment of the grant the length of the line must be computed on the definite location made prior to the passage of said joint resolution.

The company will therefore be entitled to lands for the length of the original line, to a point where it will meet a line drawn on the plat perpendicular to it from the present terminus at Kearney.

As the company has received an excess over the amount to which it is entitled on the north side of the road, the unpatented selections north of its line of definite location, will be canceled, and the lands covered thereby restored to the public domain, together with those lands within the twenty mile limits, north of said line, heretofore withdrawn, but not selected.

Action directed under the act of March 3, 1887, looking toward a recovery of title.

Secretary Vilas to Commissioner Stockslager, March 29, 1888.

By section eighteen of an act of Congress approved July 2, 1864, the Burlington and Missouri River Railroad Company was authorized to extend its road through Nebraska from the point where it strikes the Missouri River to some point not further west than the one hundredth meridian

of longitude west of Greenwich, so as to connect with the main trunk of the Union Pacific Railway, or that part of it which runs from Omaha to said meridian.

By section nineteen of the same act, there was granted to said company to aid in the construction of said road "every alternate section of public land (excepting mineral lands as provided in this act), designated by odd numbers, to the amount of ten alternate sections per mile on each side of said road, on the line thereof, and not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed." (13 Stat., 356.)

In 1865 the company filed a map of definite location of its road from Plattsmouth, on the Missouri River, westward, to a point on the western boundary of the Fort Kearney military reservation, a distance of 180.54 miles, and in 1866 filed a map of definite location, from the point last named, westward to the one hundredth meridian of longitude.

By joint resolution of April 10, 1869 (16 Stat., 54), said company was authorized to assign and convey to a railroad company to be organized under the laws of the State of Nebraska, all the rights, powers and privileges granted by the former act. On November 20, 1869, it assigned to the Burlington and Missouri River Railroad in Nebraska, a corporation organized under the laws of said State, to construct and operate a railroad from the city of Plattsmouth westward to Kearney on the Union Pacific Railway.

Afterwards, the act of Congress of May 6, 1870 (16 Stat., 118), provided:

That the Burlington and Missouri River Railroad Company, or its assigns, in the State of Nebraska, may so far change the location of that portion of its line that lies west of the city of Lincoln, in said State, as shown by the map thereof now on file in the general land office of the United States, so as to secure a better and more practicable route, and to connect with the Union Pacific Railroad, at or near the Fort Kearney reservation, said new line to be located within the limits of the land grant made by the United States to aid in its construction; *Provided, however,* That said line shall not be located farther south than the southern boundary line of township number seven, in said State, and said change shall not impair the rights to, nor change the location of the said land grant, and the said company, or its assigns, shall receive no different or other or greater quantity of land than if this act had not been passed, and no change had been made in the located line of said railroad.

A map showing the change of location from Denton to the junction with the Union Pacific, near the Fort Kearney reservation, under this resolution, was referred to your office by departmental letter of October 31, 1871. Upon this line the road was built.

In the case of *United States v. Burlington, etc., Railroad Company*, the court decided that "the grant is one of quantity," and that "there is no limitation of distance from the road within which the selection is

to be made, and the court can make none;" and further that the land was taken along the line "in the sense of the statute, when taken along the general direction or course of the road within lines perpendicular to it at each end." (98 U. S., 334.)

In the case of Wood against the same company, the court said:

The line of the defendant's road was definitely located in June, 1835. The land consisting of the alternate sections designated by odd numbers within a limit of twenty miles was withdrawn from sale in July following, and so much of it as had not been previously sold, reserved, or otherwise disposed of, or to which a homestead or pre-emption claim had not attached, was thus appropriated to the satisfaction of the grant. It could not be subsequently applied to other purposes, or devoted to the claim of private parties. It was immediately taken by the grant, and would have been sufficient to satisfy it in full, if no portion of the odd sections had been previously disposed of, or subjected to other claims. And the grantee could only go beyond that limit when it was found that there was a deficiency remaining after all within it had been appropriated. (104 U. S., 329.)

By letter of January 30, 1866, Secretary Harlan directed that steps be taken to withdraw for the benefit of said grant "the odd numbered sections of land situated north of the grant to the Atchison branch of the Union Pacific Railroad, and south of the Omaha branch of said Union Pacific Railroad lying within the State of Kansas and the Territory of Nebraska," and the necessary instructions were issued to the proper local officers February 3, 1866. On March 8th ensuing, the Secretary modified his former order, and by letter of your office, dated the 24th of that month, the withdrawal was made to include only lands in Nebraska lying north of the line between townships four and five, and the lands south of that line were restored to the public domain.

December 17, 1866, Secretary Browning decided that the grant was restricted to lands within twenty miles on each side of the line of the road, and directed that the withdrawal be confined to such limits, and the lands outside thereof be restored. On January 25, 1867, he declined to reconsider said decision, and directed that his instructions be complied with. The order was carried out March 1, 1867.

On November 15, 1871, Secretary Delano held that the company was entitled to ten sections per mile on each side of its line, and that it may go more than twenty miles from said line for them if they can not be found within that limit. (1 C. L. L., 382.)

On December 11, 1871, your office ordered the withdrawal of lands outside the twenty mile limits to an extent deemed sufficient, with those already withdrawn, to enable the company to satisfy its grant.

Afterwards, on March 26, 1874, the lands outside the twenty mile limits were restored to entry and settlement; those in said twenty mile limits still remain withdrawn.

In said first cited case the court said:

It only remains to notice the further objection to the patents that land to the amount of one hundred and fifty thousand acres on the

north side of the road is included in them in lieu of land deficient on the south side.

It is true the act of Congress contemplates that one half of the land granted should be taken on each side of the road, and the Department could not enlarge the quantity on one side to make up a deficiency on the other.

It seems from the report of your office, dated September 10, 1886, (from which the facts herein are gathered,) that the Department *has* enlarged "the quantity on one side to make up the deficiency on the other, as follows:

Acres patented on north side.....	1, 368, 044. 70
Company entitled to north side.....	1, 167, 680. 00
Excess on north side.....	200, 364. 70

The company claims that they were obliged to go north of the line of road to make up their full quota under the grant, on account of the action of this Department in restoring the lands south of the twenty mile limits, originally withdrawn; that such lands were taken by settlers, and that the full amount granted could not on that account be found south of the line.

Whatever may be said of the action of the Department in thus restoring said lands, it seems clear, both from the statute, and from the decision of the supreme court, that the company is entitled to take only one half of its lands from the north side of its road.

It therefore becomes the duty of this Department, finding that the company has lands north of the line of road to which it is not entitled under the grant, to use such means as are entrusted to it by law, as the guardian of the public domain, to recover such lands so illegally patented.

Inasmuch as this grant is one of quantity, and gives ten sections per mile on each side of the line of road, it becomes necessary to determine the exact length of the line, in order to ascertain the amount to which the company is entitled.

It seems clear that the length of line must be computed on the line filed in 1865 and 1866, and not on the line filed in 1871. For the joint resolution of 1870, giving authority to change the line, and contemplating the original line and the withdrawal thereon, provided that "said change shall not change the location of the said land grant, and the said company shall receive no different or other or greater quantity of land than if this act had not been passed, and *no change* had been made, in the located line of said railroad." To carry out these provisions the new line can not be used as a basis. If the quantity must be determined as if no change of line had been allowed, it necessarily must be computed on the old line.

A map showing the location of both lines, forwarded by your said letter, is herewith returned.

Both lines run in a westerly direction from the town of Denton to a point in the SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of Sec. 23, T. 8 N., R. 15 W., where the line of 1871 turns north, crosses the old line and continues in a northwesterly direction to a junction with the Union Pacific road at Kearney. The old line continues from said crossing westwardly to the one hundredth meridian. It will not be claimed that the road is entitled to lands for the full length of the line to the one hundredth meridian, for that point is many miles west of its western terminus.

To ascertain for what length of line the road is entitled to lands, is a matter of some difficulty.

It was held by Commissioner Drummond, on May 29, 1872, that 186.11 miles should constitute the basis for the adjustment of the grant. That basis was made up of the original line as far as the crossing of the two lines, and thence of the new line of 1871 to Kearney. That basis must be abandoned, for as seen above the statute confines the basis of calculation to the old line.

The only solution of the difficulty seems to be to allow the company lands for the length of the original line, to a point where it will meet a line drawn on the plat perpendicular to it from the terminus at Kearney. The road runs practically east and west, and said point is just as far west as the western terminus. Further, it seems in harmony with the expression of the court that "Land was taken along such line in the sense of the statute, when taken along the general direction or course of the road within lines perpendicular to it at each end." Since the original line must be used as a basis, and lands can not be selected west of a line perpendicular to the general course of such basis at the terminus, the purpose of Congress seems to be subverted by drawing such line through the western terminus of the road, as actually built.

The length of the line thus computed is 182.45 miles, as found by your office. On this basis the grant amounts to 2,335,360 acres, or 1,167,680 on each side. As before shown, the excess on the north over that amount is 200,364.70 acres. It further appears that the company has received 37,930.77 acres in excess of its full quota.

Your letter further says :

In view of the facts herein cited, I recommend that legal proceedings be instituted to recover the lands patented to said company in excess of the quantity to which it is entitled. If you agree with this recommendation, a careful examination will be made to determine the exact excess, which will not vary materially from the amount already given, and the tracts patented in excess will be identified as herein proposed.

I concur in the recommendation that proceedings be instituted to reinvest the title of said lands in the United States.

In order to success in such a proceeding, however, especial care must be taken to distinguish the particular lands which have been patented to the company in excess of the quantity to which it was entitled. It

was said by the supreme court in the case first above cited, in respect to this very right of the United States, that

The patents cannot be adjudged invalid as to any lands not identified, so as to be capable of being separated; nor can any decision go against the company for its value without such identification. It is possible that the land to which the company was entitled is not so described in the patents that it can be separated from that which should not have been patented. If such be the fact, the government may be without remedy; it certainly could not insist upon a cancellation of the patents so as to effect innocent purchasers under the patentees.

This opinion imposes the necessity for the strictest care in distinguishing the lands which have been patented in excess of the company's rights. But the same court, in the subsequent case of Wood against this company, above referred to, has furnished the rule of adjustment with clearness. It there said :

Although there was no express limitation of the distance from the road in which the land was to be selected, it was necessarily implied that the selection should be made of alternate sections nearest the road, of which the land had not been previously sold, reserved, or otherwise disposed of. The company was not at liberty to pass beyond land open to its appropriation, and take lands farther removed from its road. In all grants which are to be satisfied out of sections along a line of a road, it is necessarily implied, in the absence of specific designation otherwise, that the land is to be taken from the nearest undisposed sections of the character mentioned. Such grants give no license to the grantees to roam over the whole public domain lying on either side of the road, in search of the land desired. The grants must be satisfied out of the first land found which meets the conditions named. (104 U. S., 329.)

This would entitle the company to so much land from within the alternate sections on the north side of its line of road, lying nearest thereto, as to amount altogether to ten sections in quantity for each mile of the located road; and would require that, by a correct adjustment, the company should receive nowhere along the line, lands to the north of a line parallel with the line of the road, south of which any valuable land in alternate, odd-numbered sections should remain unselected. Your communication indicates that the latter rule has not been observed, but that there still remain within the twenty mile parallel limit north of said line, unselected lands available to satisfy this grant, while, in fact, the company has selected more than it is entitled to possess in area on the north side of its road.

It is probably unnecessary to re-adjust the grant accurately to the rule defined by the supreme court, and require the company to take the available lands which ought to have been selected, and give up such as would not have been rightfully eligible, had the true rule of adjustment been correctly pursued; because the company, at least, cannot complain of the exchange in lands brought about by its own selection and at its own instigation; and it is not certain that the United States can insist upon a new selection in accordance with the true rule after having

approved the selection made and issued patents accordingly. At all events, it is not advisable to complicate this suit to recover the excess with such a claim. It will, therefore, be probably safe and just to accurately list, as the lands which were erroneously conveyed in excess of the company's right, so many tracts as shall amount to the excessive area of 200,364.70 acres, and which shall be found to lie farthest removed from the line of the company's road, upon which the grant is adjusted, on the north side thereof. This will leave, it is true, some lands still to the north of that parallel line which, under the correct rule of adjustment, should have bounded the northern confines of the grant, being lands which the company must be deemed to have accepted in exchange for available lands lying south of that parallel. But it is not believed that any confusion or failure to correctly identify the excessively patented lands can be alleged, if only those most remote are demanded for reconveyance.

There is another point of possible difficulty which should be guarded against. It has been hereinbefore held that the length of the line upon which the quantum of the grant is to be computed, must be taken to be 182.45 miles. Two other theories of the length of the line are open to contention; the one, that held by Commissioner Drummond, as hereinbefore mentioned, which makes the length 186.11; the other, the theory that the true length of the constructed road should be accepted as the mileage to be applied upon the old line to indicate the terminal points of location of the grant. In view of these three theories, in making the list of the lands, you will designate first those which must be deemed to have been patented in excess of the company's rights, upon that theory of the length of the road which will give the company the largest quantity, designating the lands so found to be in excess from among those patented most remote from the line of the road; you will next distinguish the additional lands which would be found in excess upon the theory of the length of line next most favorable to the company; and thirdly, you will distinguish the additional lands which must be so deemed patented in excess upon the theory of the true length of the line of the road as determined by this opinion. That is to say, upon the theory of a mileage of 182.45 miles, 200,364.70 acres must be distinguished and described as being excessively patented, and upon this theory, demand must be made and the suit must go. But distinction should be made between the three theories, so that, if either of the others should be adopted, the lands which, in that event, the United States would be entitled to reclaim, are distinguishable and readily to be described so that the court can proceed to judgment.

Under the act of March 3, 1887, (24 Stat., 556), it is necessary to demand from the company a relinquishment or re-conveyance to the United States of all such lands. You will please make such demand, and report after ninety days therefrom the result to this Department.

In case, as may be regarded as almost certain, some portion of the

lands patented in excess of the company's rights shall be found to have been conveyed to innocent purchasers, the fourth section of the act last referred to provides the rule to be pursued. It will be desirable, therefore, to ascertain, if practicable means be within your reach, what lands from among the list defined and described as being excessively patented to the company, have been sold to innocent purchasers, and the dates thereof. When you make, therefore, the demand required by the act of 1887, it is suggested that you should also request of the company to furnish you with the desired information in respect to such sales as may have been made. You will also report upon this matter at the end of ninety days.

You further recommend that :

The company's selection of such tracts north of its line of definite location (both inside and outside the twenty mile limits) as have not been patented, be canceled, and that said tracts together with those in the twenty mile limits north of said line, still withdrawn, but not selected for said grant, be restored to settlement and entry, as the company has, in any event, received an excess over the amount to which it is entitled on that side of the road.

This recommendation is in accord with the principles which govern the adjustment of this grant, and the lands mentioned will, therefore, be restored to the general public domain, subject to disposition under the settlement laws.

DONATION ACTS—ORPHAN—ACT OF JULY 17, 1854.

EUGENIE MCCONAHA ET AL.

The word "orphan" as used in the fifth section of the act of July 17, 1854, means a child under twenty-one years of age, bereft of both parents, on or before the date when the donation acts expired.

Secretary Vilas to Acting Commissioner Stockslager, March, 27, 1888.

I have considered the appeal of Eugenie and George N. McConaha from your office decision of May 21, 1886, rejecting their application to be permitted to locate 160 acres of land being the SE. $\frac{1}{4}$ of Sec. 20, T. 35 N., R. 4 E., Olympia, Washington Territory land district, under the provisions of the 5th section of the act of July 17, 1854.

I concur with the conclusion, that the applicants are not orphans within the meaning of said act, and your said office decision is affirmed.

COMMISSIONER'S DECISION.

Acting Commissioner Stockslager to register and receiver, Olympia, Washington Territory, May 21, 1886.

You forwarded here on the 21st of November last, the papers on appeal in the matter of the application of the children of Geo. N. McConaha, senior, and wife, to be permitted to locate one hundred and sixty

acres of land under the fifth section of the act of July 17, 1854. (10 Stat., 305.)

This section provides as follows:

"That in any case where orphans have been or may be left in either of the said Territories, whose parents or either of them, if living, would have been entitled to a donation under this act, or either of those of which it is amendatory, said orphans shall be entitled to a quarter section of land, on due proof being made to the satisfaction of the surveyor general, subject to the decision of the Secretary of the Interior. Said land to be set off to them by the surveyor general in good agricultural land, not reserved or otherwise appropriated under any law of Congress; and in case of the death of either or any of said orphans, after their lands shall have been designated by the surveyor general, the right or rights of the deceased shall vest in the survivor or survivors."

The present application is to have a selection made to the SE. $\frac{1}{4}$ of Sec. 20 in T. 35 N., R. 4 E., Washington Territory under said section, for Geo. N. McConaha, junior, and Eugenie McConaha.

It appears by the papers submitted in this case that George N. McConaha, senior, was born in Cleveland Ohio, in the year 1823: was married to Ursula Hughes in 1846; became a resident of Seattle, Washington Territory in 1852; and was at the time of his death, which occurred May 4, 1854, a member of the Territorial Legislature. The result of said marriage was the birth of three children, namely: George N., Eugenie and Ursula,—George N., and Eugenie are now living—Ursula died at the age of eight years. The mother of these children, now Ursula Wykoff, is still living.

George N. McConaha, junior was born in 1848, and his sister, Eugenie was born in 1852. These surviving children were both above the age of twenty-one years, at the date of their application for a selection of land.

It is alleged that neither of said parents, or their said children, has ever received any of the benefits conferred by the act of September 27, 1850 (9 Stat., 496); and supplemental legislation.

The eighth section of the act of February 14, 1853 (10 Stat., 158), supplemental to said act of 1850, provides:

"That each widow now residing in Oregon Territory and such others as shall locate in said Territory, whose husband, had he lived, would have been entitled to a claim under the provisions of the act to which this is an amendment, shall be entitled, under the provisions and requirements of said act, to the same quantity of land that she would have been but for the death of her husband; and that in case of the death of the widow prior to the expiration of the four years continued possession required by said act, to which this is an amendment, all the rights of the deceased shall inure unto and be vested in the heirs at law of such widow."

Said donation acts expired on the 1st of September 1855, see proviso to the third section of the said act of July 17, 1854.

The widow after the death of her husband in May 1854, had until December 1, 1855, the right to settle upon land as a donee under the eighth section of said act of 1853. If she has not received a donation of land, it certainly is not the fault of the law.

The attorney for the present applicants has cited many authorities for the purpose of showing the meaning of the word "orphan."

If the word "orphan" in the fifth section of said act of 1854, has been used in a doubtful sense, or has been used so as to be construed in two ways and not defeat the law under either construction, then it would be necessary to endeavor to determine in what sense the law making

power has used this word. Under such circumstances, authorities would show what meaning had been given the word "orphan" by lexicographers, jurists and others who have had this word under consideration; but in my judgment it is not necessary to go outside of said donation acts to determine the true meaning of the word "orphan" as used in the fifth section of the act of 1854.

By the fourth, fifth and eighth sections of said act of 1850, different classes of donees are granted lands under certain conditions.

The fourth section grants lands to those therein named who are above the age of eighteen years.

The fifth section grants lands to those named therein, who are above the age of twenty-one years.

The eighth section grants lands to the heirs including the widow, where one is left, of a deceased settler without regard to the age of the heirs, or the widow.

The eighth section of the act of 1854, provides for another class of donees, without regard to age.

The fifth section of the act of 1854, provides for another class of donees called "orphans."

The fifth section of the act of 1850, by its first proviso, declares: "That no person shall ever receive a patent for more than one donation of land in said Territory in his or her own right."

All donations made by said acts either come under the fourth or fifth section of said act of 1850, or are conditioned upon the qualifications possessed by some person who had claimed, or could have claimed under said sections.

Congress having prior to the act of 1854, provided for those persons above the age of twenty-one years, and having limited all persons to one donation of land in his, or her own right, it is evident, beyond a reasonable doubt, that the word "orphan" in this act of 1854, so far as age is concerned, only included those under the legal age; or in other words, under the age of twenty-one years.

This act of 1854, presents another question which is this: Is a child under twenty-one years of age who has lost but one parent an orphan; or does the law require that such child shall be an entire orphan, that is, shall be bereft of both parents, before he can claim a donation of land?

I am of the opinion that the word orphan as used in this law means a child under twenty-one years of age, bereft of both parents on or before December 1, 1855, the date when said donation acts expired.

The words used in said act of 1854, "whose parents" include both father and mother, and the words "if living", were used to signify that such parents were dead.

Orphans could have been left in this Territory circumstanced as follows:

1st.—Father dead and mother living, or mother dead and father living, at the date of the original donation act of Sept. 27, 1850, and the surviving parent died without claiming land, although qualified under the law to have done so.

2nd.—Father and mother residents of said Territory after December 1, 1850, and before February 14, 1853, and both died before this latter date; the father's death having occurred first, he having died without claiming land although qualified to have done so. (No provision of law having been made before February 14, 1853, for the mother to become a qualified settler).

3rd.—Neither father or mother ever having been in said Territory, prior to December 1, 1850, and after the death of the mother, the father

became a resident of Oregon, and while duly qualified to settle as a donee, died without having done so.

To cover such cases, where only one parent was qualified to make a claim to land, the words "or either of them" were placed in the fifth section of said act of 1854, immediately following the words "whose parents", and immediately preceding the words "if living" hereinbefore referred to.

There is still another question involved in this application now under consideration, namely; can the present parties be permitted at this time to make a selection of land as orphans?

This fifth section of said act of 1854, provides that "in case of the death of either or any of said orphans after their lands shall have been designated by the surveyor general, the right or rights of the deceased shall vest in the survivor or survivors."

This portion of the law just quoted was intended to give direction to the title to the lands designated by the surveyor general. For whom was he to designate lands? The word "their" is used to describe the beneficiaries and refers to orphans. "Orphan" as used in this act signifies according to my understanding of this word a child under twenty-one years of age bereft of both parents, hence when the surveyor general makes a designation of land, it must be for a child or children under twenty-one years of age bereft of both parents one of whom, if living, would have been entitled, etc.

As all the applicants in this case were above the age of twenty-one years, when they applied for a selection of land, I am of the opinion that their application comes too late; and for that reason cannot be allowed.

I therefore sustain your refusal to permit a selection of land upon the application of said children, upon the ground stated by you, that having one parent living, they are not "orphans" within the meaning of said act of July 17, 1854; and also upon the ground that their application was not made in time, or while they were under the age of twenty-one years.

You will notify all parties in interest of this ruling, and thereafter be governed in your action by the Rules of Practice now in force in reporting the action had, to this office.

PRACTICE—SECURITY FOR COSTS—RULE 58.

HOPKINS v. HERRMANN.

By rule 54 of practice the local officers are authorized to demand security for costs "in advance of the trial"; and if, in the exercise of a sound discretion, it appears that the interests of the government require such security at the initiation of the contest, they are fully empowered to make the demand at that time.

Secretary Vilas to Commissioner Stockslager, March 31, 1888.

By letter of May 14, 1886, your office affirmed the action of the local officers in rejecting the contest of James F. Hopkins against the timber culture entry of Charles Herrmann for the NE. $\frac{1}{4}$, Sec. 20, T. 121 N., R. 71 W., Aberdeen, Dakota.

It appears that Hopkins offered contest, alleging failure to comply with the law, and that the local officers demanded a deposit of \$5 as security for costs of transcribing the testimony, under rule of practice 58.

The applicant refused to make the deposit and his contest was thereupon rejected.

Rule of practice 54 provides that: "Parties contesting pre-emption, homestead, or timber culture entries, and claiming preference rights of entry under the second section of the act of May 14, 1880 (21 Stat., 140) must pay the costs of contest."

Rule 55 provides that: "In other contested cases each party must pay the costs of taking testimony upon his own direct and cross examination."

Rule 58, upon which the action herein was taken, provides that: "Registers and receivers will apportion the cost of contest in accordance with the foregoing rules, and may require the party liable thereto to give security in advance of trial, by deposit or otherwise, in a reasonable sum or sums, for payment of the costs of transcribing the testimony."

Appellant urges that rule 58 does not authorize the local officers to demand security for costs at the initiation of the contest, nor until the hearing is about to commence.

In this construction of the rule I cannot concur. By this rule a certain discretion is lodged in the local officers. They are authorized to demand security "in advance of trial", and if in the exercise of a sound discretion it appears that the interests of the government require such security at the initiation of the contest, they are fully authorized by said rule to make the demand at that time. I do not find the sum specified in this case an unreasonable one.

Said decision is accordingly affirmed.

FORT LARNED MILITARY RESERVATION—ACT OF AUGUST 4, 1882.

COOK v. WILBUR.

Under the act of August 4, 1882, providing for the disposition of Fort Larned military reservation, purchasers of lands therein embraced are required to show due compliance with the pre-emption law in matters of settlement and residence.

Secretary Vilas to Commissioner Stockslager, March 31, 1888.

* * * * *

On appeal from your said decision, Wilbur insists, not only that he did in fact make such a case as to residence, etc., as would have satisfied the pre-emption law, had that been the law governing the case, but, furthermore, that his right to purchase must be decided, not by the pre-emption law, but by the act of August 4, 1882 (22 Stat., 217), providing "for the disposition of the Fort Larned military reservation", the tract here in question having been included within that reservation.

The second section of the act referred to provides as follows:

That the Commissioner of the General Land Office is hereby directed to have said public lands . . . surveyed in like manner as

other public lands, and shall thereupon cause the same to be appraised by three disinterested competent persons and after such appraisement shall have been approved by the Secretary of the Interior the land shall be sold to actual settlers only, at the appraised price, and as nearly as may be in conformity to the provisions of the pre-emption laws of the United States; Provided, That no person shall be permitted to purchase more than one quarter section of said land.

This enactment differs essentially from that of May 28, 1880 (21 Stat., 143), the one construed in the case of *United States v. Woodbury* (5 L. D., 303), upon which the appellant relies. That decision, indeed, is expressly based upon the omission, from the act of 1880, of any such provision as that which this act contains,—that the lands shall be disposed of “as nearly as may be in conformity with the pre-emption laws of the United States.” Thus after quoting the phrase in the Osage act of May 9, 1872 (17 Stat., 90), *namely*, “in accordance with the general principles of the pre-emption law”,—the opinion says “It would seem from this act that Congress intended that all entries of Osage Indian lands should be governed by the general pre-emption laws in every respect, and such was the practice of the Department under that act”.

Section 2283 of the Revised Statutes providing that certain entries should be made “in accordance with the general provisions of the pre-emption laws”, has been construed to require compliance with the requirements of the pre-emption laws with respect to settlement and residence.

I see no reason for concluding that the provision in the present case ought to be otherwise construed.

* * * * *

TIMBER CULTURE ENTRY—PRELIMINARY AFFIDAVIT.

WILLIAM CHRISMAN.

The preliminary affidavit required of the timber culture entryman must be executed in person, and within the land district in which the entry is to be made.

Secretary Vilas to Commissioner Stockslager, March 31, 1888.

By letter of February 26, 1885, your office rejected the relinquishment of the timber culture entry made February 24, 1881 by Reuben Selby, for the NE. $\frac{1}{4}$ Sec. 10, T. 7, R. 23 W., Kirwin, Kansas; and also the application of William Chrisman, presented therewith, to enter said tract under the timber culture law.

From the record it appears that Chrisman, a resident of Preble county, Ohio, on July 27, 1883, executed a power of attorney before a notary public of said county, authorizing one Charles Virmond to file for him such papers as were necessary to secure a timber culture claim on said tract.

On August 7, 1883, Virmond presented to the local office a paper purporting to be the relinquishment of said entry not signed by Selby but

by Virmond. It was refused by the local officers and appeal was taken. Virmond also presented the application of Chrisman to make entry, executed in the land district by Virmond. The application and affidavit are both signed by Virmond, as attorney for Chrisman.

The application was properly rejected. The timber culture law requires that:

The person applying for the benefit of this act shall upon application to the register of the land district in which he or she is about to make such entry, make affidavit, before the register or the receiver or the clerk of some court of record, or officer authorized to administer oaths in the district where the land is situated.

In this case the person applying for the benefits of the act is presumably Chrisman. Under the statute therefore, he is required to appear in person in the said land district and make the required affidavit before his entry can be admitted.

Since your said decision a relinquishment of said entry, apparently in proper form, has been presented and thereupon on November 26, 1886, the entry was canceled. This relinquishment was transmitted by your office letter of December 16, 1886. It becomes unnecessary therefore to determine the question raised by the rejection of the former relinquishment. The latter relinquishment is herewith returned for such action as may be proper, together with the other papers in the case.

PRE-EMPTION—SECOND FILINGS—MINOR—TRANSMUTATION.

JAMES F. BRIGHT.

Though a filing made by a pre-emptor under the disability of infancy is invalid, such invalidity is cured by the attainment of majority prior to the inception of an adverse claim.

The transmutation of such a pre-emption claim, after the attainment of majority, operates to estop the claimant from again exercising any right under the pre-emption law.

The transmutation of a pre-emption claim into a homestead entry, is such an exercise of the pre-emptive right as to bring the pre-emptor within the inhibition of section 2261 of the Revised Statutes.

Secretary Vilas to Commissioner Stockslager, March 31, 1888.

I have considered the appeal of James F. Bright from your office decisions of December 22, 1885 and April 5, 1886, holding for cancellation his pre-emption cash entry for the SE. $\frac{1}{4}$, Section 13, T. 2 S., R. 32 W., Oberlin land district, Kansas, on the ground that said Bright had exhausted his pre-emption right by the filing of a declaratory statement September 18, 1868, in the Benson land district Minnesota.

The claimant admits, and the records of your office show, that on September 18, 1868, he filed pre-emption declaratory statement for the

S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Section 8, T. 119 N., R. 33 W., Minnesota. This filing was transmuted to homestead entry No. 3579, January 2, 1869, on which he made final proof November 7, 1874, and patent in favor of said Bright was duly issued January 15, 1875.

While the claimant admits the first filing, he claims that it was illegal and void because when it was made he was a minor not the head of a family, and that being void it can not operate to divest him of his pre-emption right under the law.

According to Bright's statement, which is corroborated by the affidavit of his parents, he was twenty years, eight months and twenty-one days old when he filed his declaratory statement for the land in Minnesota. When, however, on January 2, 1869, he transmuted his filing to homestead entry No. 3599, he had attained his majority.

Minors, not heads of families, are not qualified pre-emptors under Section 2259, Revised Statutes; and the filing made by the claimant in this case, having been made when he was laboring under the disability of infancy was illegal. Was this illegality cured by claimant's attaining his majority before any adverse claim had attached? In the cases of *Kelly v. Quast* (2 L. D., 627) and *Mann v. Huk* (3 L. D., 453), and *Ole O. Krogstad* (4 L. D., 564) the pre-emptor at the time of filing the declaratory statement was not a qualified pre-emptor because at the time of filing he was an alien; but in each of said cases the disability of alienage was cured by the filing of a declaration of his intention to become a citizen of the United States before any adverse claim had attached, and such claims were allowed to stand subject to future compliance with the law. I think these cases are analogous to the case at bar; and while the filing in this case was illegal in its inception on account of the minority of the attempted pre-emptor, this disability was cured by his attaining his majority prior to exercising the right to transmute the land held under his pre-emption filing to a homestead entry, a right only allowed to those having a valid pre-emption filing. (20 Stat., 113). In the cases referred to, where the disability was alienage, the government did not declare the filing void; in this case, where the disability is infancy, I hold that the act of the pre-emptor in transmuting his pre-emption filing into a homestead entry, after he had attained his majority, operates to estop him from again exercising any pre-emption right the law may give him. In the absence of compliance with legal requirements the doctrine "that he who seeks equity must do equity" prevails; and the claimant in this case, having received the benefits of his first filing, which was illegal, can not be allowed to make another filing under the pre-emption laws.

Other considerations also enter into the determination of this case. Section 2262, Revised Statutes, requires the settler to make oath "that he has never had any right of pre-emption under section 2259", and Bright took that oath in making proof in support of his Kansas filing. The right to transmute his pre-emption filing on the land in Minnesota

to a homestead entry was clearly a benefit derived from section 2259, Revised Statutes, as it presumed a valid declaratory statement.

Section 2261 provides: "No person shall be entitled to more than one pre-emption right by virtue of the provisions of section 2259; nor where a party has filed his declaration of intention to claim the benefits of such provisions, for one tract of land, shall he file, at any future time, a second declaration for another tract".

In the case of *J. B. Raymond* (2 L. D., 854), it was ruled, following the decision in the case of *Baldwin v. Stark* (107 U. S., 463), that a pre-emptor may file but one declaratory statement. The point involved was the right of the pre-emptor to make a second filing on the same land; but the decision says:

Section 2259 of the Revised Statutes provides that persons possessing certain specified qualifications may 'enter' 160 acres, but this section does not in any manner designate such entry as a 'pre-emptive right'.

Sections 2265 and 2267 provide for the filing of a declaratory statement in the case of unoffered lands, and for making proof and payment thereafter. By the terms of these sections thirty-three months from the date of his settlement is accorded to the pre-emptor, in which to comply with the law. During this time he is protected by the law in the quiet enjoyment of his claim, and no payment for such privilege is required. Before such an occupation of public land is lawful, certain acts on the part of the would-be pre-emptor are necessary. He must settle in person upon the land, and within three months after such settlement file his written notice of intention on his part to purchase said land. By these acts, when followed by residence and improvement, he is enabled under the pre-emption law to practically own the land claimed by him for thirty-three months before payment is required. But when he does make payment therefor he is precisely upon the same footing as though the land had been open to private cash entry, so far as the actual purchase is concerned. The right, then, to hold the land before payment is made therefor, upon promising to buy the same at a stipulated time, together with the right to purchase at such time, is the 'pre-emptive right' referred to in section 2261, and such right is initiated by settlement and filing a declaratory statement, and has had its full life when the time stipulated for purchase arrives. If for any reason the pre-emptor does not perform his part of the contract the fact yet remains that he has once enjoyed the pre-emptive right. He has held the land the full period of time allotted him under the law, and by what further right can he ask the Department to double the time named by the statute? Such a construction would in effect be equivalent to legislation on the part of the Department.

I am of the opinion, therefore, that when Mr. Bright, the appellant in this case, transmuted his pre-emption filing on land in Minnesota into a homestead entry he made such exercise of the "pre-emptive right" as brings him within the provisions of Section 2261, Revised Statutes, and which will prevent his acquiring another tract of land under the pre-emption law. Case of *O. C. Rashaw* (6 L. D., 570).

Your decisions holding for cancellation his cash entry for the SE. $\frac{1}{4}$, Section 13, T. 2 S., R. 32 W., Oberlin, Kansas, is accordingly affirmed.

CERTIORARI—APPEAL—FINAL DECISION.

JAMES HILL.

A decision, rendered on the submission of final proof, holding that the entryman has failed to show due compliance with the law, and suspending such proof until further compliance is shown, is in effect a rejection of the proof, and has all the elements of finality necessary to authorize an appeal therefrom. Application for certiorari should be made under oath, and set forth fully the grounds on which it is made.

Secretary Vilas to Commissioner Stockslager, March 31, 1888.

James Hill has filed application for certiorari alleging that final proof submitted in his timber culture entry for the NW. $\frac{1}{4}$, Sec. 24, T. 149, R. 47, Crookston land district, Minnesota, was suspended by your office upon the ground that "the trees had not attained sufficient size to thrive well without further cultivation", and the claimant was required to make further cultivation and submit proof thereof.

From this action applicant alleges that he filed an appeal which you declined to transmit upon the ground that said action was not appealable, citing case of W. B. Ennis (5 L. D., 429), as a precedent for said ruling.

This is an informal application and is not sworn to, as required by rule 84, which requires that such applications *shall* be made in writing *under oath*, and shall fully and specifically set forth the grounds upon which the application is made. For this reason the application should be denied. But, if the allegations contained in this application are true, it discloses to the Department that an erroneous application is being made of the principle decided in the case of W. B. Ennis, which will, if continued, deny to claimants their legal right of appeal and increase the work of the Department.

While there is a similarity between the case of Ennis and the case presented by this application, the principle upon which that case was decided has no application to this case. In the case of Ennis, no final decision was made either suspending or rejecting the testimony, but he was required to furnish, through the local officer, supplemental testimony explaining absences which appeared from the testimony then before the Commissioner, to be "vague and uncertain." From this he appealed.

The Department held that he had not shown that any final decision had been made from which an appeal could be taken, and that applicants might refuse to supply such proof, and elect to rely upon the proof submitted, in which event, it may be the duty of the Commissioner to make a final decision from which he would have the right of appeal.

In the case presented by this application no explanation was required of the proof, but your office held that the acts of the entryman failed to show a compliance with the law, and his proof was suspended until

a further compliance with the law was shown by the future and further cultivation of his claim. This was practically a rejection of the proof and had all the elements of finality necessary to authorize an appeal therefrom. In view of this fact I direct that you will examine into this case and if the allegations are true, and the claimant's appeal has been filed in time, you will transmit the record as of the date the appeal was filed.

Herewith I return the application for file in your office.

FINAL PROOF—RESIDENCE—TRANSFEREE.

HONORA MAHONY.

After the establishment of a *bona fide* residence, absences, for periods not exceeding two weeks at a time, for the purpose of securing a support, may be excused.

The objections raised by the General Land Office, as to the residence shown on final proof, having been fairly met and satisfactorily explained, the case will not be returned by the Department for response to newly stated objections to the proof of inhabitancy.

While the transferee, after entry and before patent, has no greater right than the entryman, yet there should be no strained cavil, or excessive search for objections to defeat him.

Secretary Vilas to Commissioner Stockslager, March 31, 1888.

I have considered the appeal of O. Ferguson, assignee of Honora Mahony, from your office decision of June 3, 1886, holding for cancellation her homestead cash entry No. 12,135, for the NW. $\frac{1}{4}$, Sec. 11, T. 117, R. 78 W., Huron land district, Dakota.

The entry was made November 13, 1883. Commutation final proof was made December 16, 1884, and cash certificate issued December 29, 1884. The proof shows settlement May 10, 1884. The improvements consist of a frame house, ten by twelve feet, five acres broken and cultivated, the whole valued at \$75. A special affidavit states that claimant commenced actual residence on the tract in dispute May 10, 1884, and has continued the same to the present time; that during the month of August she was compelled to go away and hunt for work to support herself and to enable her to raise money to improve and develop her said land; that she has endeavored to comply and has complied, with the requirements of the homestead law as fully as her straitened circumstances would permit.

By letter of July 31, 1885, you suspended the said cash entry and called upon the claimant to state, in a corroborated affidavit, the number, duration and causes of her absences from the land from the date of entry to the making of final proof.

The claimant responded in an affidavit made August 20, 1885, averring that she established residence upon the tract entered May 10, 1884, and was actually present there at least two thirds of the time between said

date and the day on which final proof was made; that she was very poor and had no means of support except what she earned with her hands; that she had seven small children to support and had no way to support them except by leaving the place occasionally for one or two weeks at a time and earn food for them by working out; that her absences at various times for the purpose above stated would make about one-third of the time from May 10, to December 16, 1884, and all the balance of the time she was on the place; that she cannot state the precise dates when she was absent, but her absences were distributed about equally during the months above mentioned.

In corroboration of the foregoing John H. Smith swears that, he knows the claimant established residence upon the tract May 10, 1884, and that, except with the absences hereinafter mentioned, she lived there continuously until December 16, 1884; that affiant lived within one mile and a half of the land in controversy, was well acquainted with the claimant and frequently visited at her house; that she was a very poor woman and had several small children to support by the labor of her hands; that affiant knows of claimant's going out to work at various times a week or two weeks at a time; thinks she was absent one-third of the time; thinks she was present on the land two-thirds of the time and that it was her actual residence during the whole time.

You hold in your letter of November 11, 1886, that this affidavit is not sufficient. You say, "it is shown in final proof that she is a single woman while in the special affidavit submitted she swears that she has seven children to support."

Inasmuch as in the homestead affidavit made November 13, 1883, the claimant swears that she is a widow, it is evident that there is no conflict between the two statements because a widow is certainly a single woman and may have seven children to support.

The question turns upon the good faith of the claimant. If she established residence at the time alleged and continued to make her home upon the tract until she made final proof, I think her absences for periods not exceeding two weeks at a time, while away working for means of support of herself and children, may be excused. Henry H. Harris (6 L. D., 154); Nellie O. Prescott (id., 245).

Although a suspicion might arise on the proof as to the good faith of the claimant, because it does not appear that her children resided with her, yet it is disclosed that she is a poor widow striving to provide them a home, and it is not to be supposed reasonably, therefore, that further inquiry would disclose the possession of another home of such a character as to deny her good faith in this action. Besides, there is no contest and there was no reason for the same effort to meet every supposable theory of objection. She has met what was raised first by the General Land Office satisfactorily, and I am not disposed to send the case back for answer to a newly stated objection.

It is to be remembered too that the land has been sold and a purchaser for valuable consideration holds it, on the action of the local land office, and while the rule is well settled that the transferee has no greater right than the entryman, yet there ought to be no strained cavil, or excessive search for objections to defeat him. I think the decision should be reversed and the patent issued.

TIMBER CULTURE ENTRY; SETTLEMENT RIGHTS.

HOWELL v. BISHOP.

The wrongful enclosure of public land will not take it out of the class of lands subject to timber culture entry.

The mere purchase of another's improvements, not followed by settlement or residence, confers no rights under the homestead law.

The case of *Bender v. Voss* cited and distinguished.

Secretary Vilas to Commissioner Stockslager, April 10, 1888.

On September 11, 1884, B. B. Bishop made timber culture entry for the W. $\frac{1}{2}$ NE. $\frac{1}{2}$, Sec. 34, T. 3 N., R. 32 E., La Grande, Oregon.

September 22, following, Jane Howell applied to enter the same tract under the homestead law. In an affidavit she alleged that, she was residing on the land, had it enclosed with a wire fence and had fourteen acres under cultivation. A hearing was thereupon ordered by the local officers.

At the hearing Mrs. Howell submitted testimony, and the entryman offered the record and testimony of a former contest between Mrs. Howell and George W. Bishop.

Referring to the decision of this Department in said contest rendered August 27, 1884, I find that said George W. Bishop made homestead entry for the tract now in dispute August 29, 1882, and on November 3, same year, the said Mrs. Howell applied to make homestead entry of the same, that her application was rejected and a hearing was ordered. Upon the testimony then taken, and the record, it appeared that on June 21, 1880, Mrs. Howell had filed pre-emption declaratory statement for the NW. $\frac{1}{4}$ of said section and made pre-emption proof and entry for the same June 29, 1882; that while living on her pre-emption claim she entered into an arrangement with one Downey, whereby he agreed to build a fence on three sides of said W. $\frac{1}{2}$ NE. $\frac{1}{4}$, joining the same to a fence which inclosed land adjoining, claimed by her, so as to completely inclose the tract in controversy; that she was to furnish the wire for said fence, and that Downey was to hold the tract in dispute for her, until she could make proof and entry upon the claim where she then resided. Downey had filed a declaratory statement for said W. $\frac{1}{2}$ NE. $\frac{1}{4}$, December 3, 1879, but abandoned his claim about November 20, 1880.

It further appears that Mrs. Howell paid said Downey the sum of \$200 for his improvements and possessory right and that the fencing cost her in addition about \$150.

Said decision of the Department states that Mrs. Howell did not perform a single act of settlement, from the date when she made her pre-emption proof and entry until the date of Bishop's entry, and held that the inclosure of the tract in dispute, under the contract as proven was fraudulent, and for the purpose of preventing *bona fide* settlers from entering the land, and the tract was awarded to Bishop. Thus the first contest terminated on August 27, 1884.

Subsequently, on September 11, 1884, the relinquishment of the homestead entry of said George W. Bishop was filed and B. B. Bishop made timber culture entry for the tract. Thereupon the present contest was initiated as above shown by her application of September 22, 1884.

On the hearing the local officers found the facts to be as shown in the first contest, and further that about ten acres were plowed, and that there was a cabin on the land; that Mrs. Howell was using the land in dispute for pasture with other lands inclosed therewith; that no one was residing on the tract in dispute on or from September 1 to September 11, 1884, or that any act of settlement was made on said land by Mrs. Howell during said period, or at any time prior to the entry of said B. B. Bishop.

In these findings of fact I concur, after a careful examination of the testimony. The local officers rejected the application of Mrs. Howell, and allowed the entry of Bishop to stand. Your office by letter of July 27, 1886, found that the tract was in the "undisputed possession of Howell and was occupied and improved by her" and therefore not subject to entry under the timber culture law, citing *Bender v. Voss* (2 L. D., 269).

Without at present passing on the correctness of the rule announced in the case of *Bender v. Voss*, that a timber culture entry should be made upon vacant unimproved lands, not upon cultivated land covered by the valuable improvements of another and in possession of another, I think the present case can be distinguished from it. In the former, Voss was residing on the tract, and cultivating it, when the timber culture application was offered, and had initiated his claim in good faith and at a time when there was no other claimant. In the present case the claim set up to defeat the right of the timber culture entryman has been adjudged fraudulent. The wrongful fencing in of the land cannot take it out of the class of lands subject to timber culture entry. The mere purchase of another's improvements, not followed by settlement or residence does not confer a right under the homestead law.

I therefore find no reason for disturbing the timber culture entry of Bishop, and the decision appealed from is, accordingly, reversed.

TIMBER CULTURE CONTEST—SPECULATIVE ENTRY.

THOMPSON v. MANARY.

Under a charge that the entry is made for the benefit of another, the evidence should clearly demonstrate the fact, especially when presented after years of labor upon the land to perfect title thereto.

Secretary Vilas to Commissioner Stockslager, April 10, 1888.

The contest in this case is based upon an allegation that Manary, the claimant, is not holding the claim for his own use and benefit, but directly for the benefit of some other person, appearing from the evidence to be, as the contestant claims, one Van Eaton, his father-in-law. In point of fact, the evidence discloses that Manary is insisting upon the claim as his own, that he denies that it is held or ever was held by him for Van Eaton; and the evidence on the part of the contestant only goes to show that when Manary made the filing it was with a verbal understanding with Van Eaton that he should have Manary's right to file for one hundred and fifty dollars, and that Van Eaton has done some of the work of breaking and cultivating and tree-planting. This testimony consists only of Van Eaton's own evidence, with the addition of two others who have heard statements of Van Eaton, not of Manary, and of Van Eaton's wife, who claims to have heard something from Manary about the time of the entry to the same effect. Thompson, the contestant, knows nothing of the facts, and appears to be contesting at Van Eaton's instigation, who has apparently fallen out with his son-in-law. Manary explicitly denies the alleged understanding at the time the filing was made, and asserts that all that has been contributed by Van Eaton in the way of money or work has been returned to Van Eaton by him in work or otherwise, and is supported in his theory by the fact that he was himself contesting a previous entry by another, when his entry was made by the other's relinquishment.

There is no allegation or proof to the effect that Manary has not complied with all the requirements of the timber culture act in any particular. So far as he has proceeded he is within the ground of the first section. He had, at the time of this contest, devoted two years' labor to the fulfillment of the conditions of the entry, and if he has continued since to observe the law, has now devoted five years.

If it be admitted that a timber culture entry can be contested and annulled for the want of truth in that statement of the affidavit which is required at the time of the application to the register to make the entry, to the effect that the applicant makes "the said application in good faith, and not for the purpose of speculation, or directly or indirectly for the use or benefit of any other person or persons whomsoever," and there is no other foundation in the statute for such a contest—it is, at least, clear that the testimony, particularly when presented after years of labor upon the land to perfect the title, should be entirely satisfactory in its demonstration of the fact. The testimony

in this case comes very far short of it. It is evidently inspired by the bitterness of a family quarrel, and the rights acquired under this entry ought not to be denied upon such a basis. The contest should be decided in favor of the claimant, and I must, therefore, reverse your decision and herewith return the papers.

RAILROAD GRANT—SETTLEMENT RIGHT—RES JUDICATA—ACT OF JUNE 22, 1874.

WINONA & ST. PETER R. R. CO. v. WARNER.

- A settlement made during a temporary withdrawal of the land, but continued until the revocation of such withdrawal, and in existence at the time of the permanent withdrawal, excepts the land therefrom.
- A decision of the General Land Office that on relinquishment the railroad company would be entitled to select indemnity under the act of June 22, 1874, will not preclude departmental consideration as to the right of the company to thus relinquish, when the selection comes before the Department for approval.
- A selection under said act must be rejected if it appears that the company had no title or right in the tract relinquished.

Secretary Vilas to Commissioner Stockslager, April 11, 1888.

I have considered the case of the Winona and St. Peter Railroad Company v. Fred L. Warner, on appeal by said company from your office decision of February 26, 1886, rejecting its application to select the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, and the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 30, T. 111 N., R. 37 W., 5th P. M., Redwood Falls, Minnesota land district, in lieu of certain land relinquished under the act of June 22, 1874.

The N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 13, T. 111 N., R. 28 W., 5th P. M. were within the indemnity limits common to the Winona and St. Peter and the St. Paul and Sioux City Railroads under the act of Congress approved March 3, 1857 (11 Stat., 195).

Temporary withdrawals under this act were ordered March 7, April 9, and June 22, 1857, the latest of which expired November 12, 1857. Permanent withdrawal of the land in the indemnity limits was ordered March 26, 1858.

Nels Nelson filed pre-emption declaratory statement for said land in Sec. 13, August 12, alleging settlement August 5, 1857, which was canceled October 7, 1857, because allowed during temporary withdrawal, but it is claimed and not denied that Nelson was never advised of this action. On October 26, 1863, Nelson made homestead entry for the said land basing his claim thereto upon his settlement as alleged in his filing, and submitted testimony showing that he had resided upon and cultivated the land continuously from the date of his original settlement. On November 2, 1868, Nelson submitted final proof under his homestead entry, upon which final certificate was issued which was in due time followed by patent.

Additional lands were granted for the benefit of these roads by acts of May 12, 1864 (13 Stat., 74), and March 3, 1865 (13 Stat., 526), which

acts were construed by your office as granting the odd sections within ten miles on each side of the lines of road, and permitting indemnity selections within twenty miles. One half the land in section 13 fell within the ten mile limits of the St. Paul and Sioux City road and all of it fell within the same limits of the Winona and St. Peter road. On July 3, 1876, the Winona and St. Peter company relinquished its claim to the land in Nelson's favor, and applied to select under the act of June 22, 1874 the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, and the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 30, T. 111 N., R. 37 W. in lieu thereof. Upon consideration by your office it was held by decision of December 19, 1881, that the Winona and St. Peter company was entitled to only a moiety of the original tracts and was therefore entitled to select eighty acres in lieu thereof, and was required to elect what tracts of those applied for it would take.

It is said in your office decision of February 26, 1886, that no election has been made, and also that neither of the companies have selected or applied for the land embraced in Nelson's entry. Both of these statements appear to be erroneous. A careful examination of the records and files of your office shows that the Winona and St. Peter company, through its attorney W. K. Mendenhall, did, on October 24, 1883, file in your office its election of the E. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of said Sec. 30, and also that said company, on February 23, 1885, made formal selection of the original tract as a basis for the lieu selection.

On May 4, 1885, Fred L. Warner applied to make homestead entry of the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, and the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 30, T. 111 N., R. 37 W., which application was rejected by the local officers because of the pending selections by the Winona and St. Peter company.

On appeal by Warner, your office decided that the company never had any interest in the land relinquished in Nelson's favor, and, therefore, had no right to land in lieu thereof; that the decision of December 19, 1881 was erroneous, revoked said decision and rejected the company's application to select such lieu lands. At the same time the action of the local officers in rejecting Warner's application, under the circumstances was approved, but it was held that if that decision became final his entry would be admitted. From that decision the company appealed.

It is urged in support of the appeal that, Nelson's claim did not operate to except the land from the withdrawal, and therefore his entry was not valid and that the right of the company to relinquish and make selection of lieu land under the act of June 22, 1874 (18 Stat., 194), was *res judicata* under the decision of your office of December 19, 1881.

Nelson's settlement and filing were made while the land was temporarily withdrawn, but the settlement continued until such withdrawal was revoked, and was yet in existence on March 26, 1858, when the permanent withdrawal became effective. The fact that this filing was canceled October 7, 1857, can not be held to have concluded Nelson's rights under his settlement since that cancellation was made without

notice to him and, therefore, without affording him an opportunity to defend against such action, or to re-assert his claim. The filing having been canceled "in consequence of the land applied for not being open to pre-emption" said filing, under the ruling in force at that time and at this time was, and is, "treated as a nullity, and as no inhibition to his subsequently filing a legal and proper declaration for the same tract", Nelsons' settlement then being at the date of the withdrawal a valid pre-emption claim capable of being perfected, excepted the land from the withdrawal and his subsequent entry excepted the land from the grants of 1864 and 1865. Hence the railroad company had no interest to relinquish so as to entitle them to select lien lands under the act of June 22, 1874.

The decision of your office of December 19, 1881 was clearly erroneous.

It is strongly contended that said decision was a finality, and that the question cannot be opened and re-adjudicated. This contention cannot be sustained in view of the ruling in the case of the Hastings and Dakota Ry. Co. *v.* Whitnall (4 L. D., 249). Furthermore it was said in the decision of December 19, 1881, that the selection "will be submitted to the Secretary for approval." The selection of the tracts in controversy may be considered as now before the Department for approval or rejection. In determining the disposition to be made of these selections, the Department will, in exercise of the supervisory authority reposed in the Secretary, as its head consider all the facts connected with these selections both as to the condition of the land asked for, and the validity of the company's claim to the land relinquished, upon which its present claim is based.

As hereinbefore set forth, it is found that the company had no valid claim to the lands relinquished and hence the selection of the tracts here in controversy, based upon that relinquishment, must be and is hereby rejected. The claim of the company being rejected Warner's application to make homestead entry may be allowed unless some reason not now appearing be shown to prevent it.

Your office decision of February 26, 1886, is with the modifications herein indicated, affirmed.

RAILROAD GRANT—INDEMNITY SELECTION—SETTLEMENT RIGHT.

BRIGHT *v.* NORTHERN PAC. R. R. CO.

At the date of the company's application to select the land as indemnity it was covered by an expired pre-emption filing, but, as the record does not affirmatively show that the pre-emptor had in fact abandoned his claim, a hearing is ordered to determine the status of the tract at the date of selection.

Secretary Vilas to Commissioner Stockslager, April 11, 1888.

I have considered the case of James Bright *v.* the St. Paul, Minneapolis and Manitoba Railway Company and the Northern Pacific Railroad Company, as presented by the appeals of said companies from the

decision of your office, dated May 18, 1886, rejecting their claims for lands in Sections 11 and 15, in T. 131 N., R. 37 W., Fergus Falls land district, in the State of Minnesota.

The record shows that said lands are within the thirty mile indemnity limits of the withdrawal of July 6, 1872, for the benefit of the Northern Pacific Railroad Company and also within the twenty mile indemnity limits of the withdrawal of February 15, 1872 for the benefit of the St. Paul, Minneapolis and Manitoba Railway Company.

On July 24, 1872, one John J. M. Hawkins filed his pre-emption declaratory statement No. 1388, for Lot 3, Sec. 10, Lot 5, Sec. 11, the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and Lot 1, Sec. 15, and Lot 6, Sec. 14, in said township, alleging settlement on October 1, 1870, which filing does not appear to have been canceled upon the records of your office.

On August 2, and December 29, 1883, the Northern Pacific Railroad Company applied to select the tracts in said odd-numbered sections, which applications were rejected by the local office and the company duly appealed.

On April 15, 1884, said Bright offered to file his pre-emption declaratory statement, for Lots 6 and 7, Sec. 14, Lot 5, Sec. 11, and the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and Lot 1, Sec. 15, alleging settlement same day, and claiming that the tracts in the odd numbered sections were excepted from said withdrawals by reason of the claim of said Hawkins. A hearing was ordered, and the St. Paul, Minneapolis and Manitoba Railway Company was notified thereof, but no notice was given to the Northern Pacific Railroad Company.

On May 18, 1885, the St. Paul, Minneapolis and Manitoba Railway Company applied to select the tracts in said odd-numbered sections, which application was rejected by the local officers and the company appealed. Your office found that the testimony showed that Hawkins was a duly qualified pre-emptor and actually residing upon said land at the date of the receipt of the orders of said withdrawals by the local land officers, and that this claim was not denied by the St. Paul, Minneapolis and Manitoba Railway Company; that the hearing could have no effect upon the rights of the Northern Pacific Railroad Company which was not a party to the same; that it was not necessary that a hearing should have been held, for the reason, that Hawkins's said filing was *prima facie* evidence that said land "was occupied at the time when the orders of withdrawal might have become effective," and therefore said land was excepted from the operation of said withdrawal; that said filing has continued as a bar to the selection of said land for indemnity, and the applications of the Northern Pacific Railroad Company were properly rejected; that the application of the St. Paul, Minneapolis and Manitoba Railway Company was properly rejected, because said filing was still of record, and for the additional reason, that said applications of the Northern Pacific Railroad Company and of said Bright were pending on appeal before your office.

It is apparent from the record, that the right to claim said lands in the odd-numbered sections is either in the Northern Pacific Railroad Company or in said Bright, if the rights under Hawkins' filing are lost. This Department ruled in a case between the same companies, that priority of selection of land for indemnity determines the right thereto, and "that the Northern Pacific Railroad Company having made prior selection for the lands in controversy within the limits above indicated, is clearly entitled to the same as against the appellant company." It has been repeatedly held by the courts and this Department that the company can acquire no right to indemnity lands prior to selection thereof, and, that the status of said lands at the date of the application to select, must govern the determination of conflicting claims. *Prest v. Northern Pacific Railroad Company* (2 L. D., 506); *St. Paul M. & M. Ry. Co. v. Bond* (3 L. D., 50); *Southern Pacific R. R. Co. v. Reed* (4 L. D., 256); *Brady v. Southern Pacific R. R. Co.* (on review) (5 L. D., 658); *Ryan v. Railroad Company* (99 U. S., 382).

In the case at bar, the time allowed the pre-emptor, Hawkins, to prove up and pay for the land embraced in his said filing, had passed long prior to said applications of the Northern Pacific Company. This Department held in the case of the Southern Pacific Railroad Company *v. Saunders*, that an alien could acquire no right to public land prior to the time when he filed his declaration to become a citizen and that, as the record did not show when Saunders declared his intention to become a citizen of the United States, "until it is shown that he settled upon the land in dispute prior to the attachment of the railroad grant, and that he was at that time qualified to make settlement, his filing should not have been received," citing *James et al. v. Nolan* (5 L. D., 526). A hearing was accordingly ordered to determine the right of the parties. (See also *Central Pacific R. R. Co. v. Painter* *ibid.*, 485).

In the case of *Allen v. Northern Pacific R. R. Co.* (6 L. D., 520) this Department held that where a tract of land is embraced within an expired filing at date of definite location, it should not be awarded to the company under its grant, without a hearing to ascertain whether in fact the pre-emptor had at such time abandoned his claim.

No hearing has been had in this case between the Northern Pacific R. R. Co. and said Bright, and the testimony in the record does not affirmatively show that Hawkins had, in fact, abandoned his claim. I have, therefore, to direct that a hearing be ordered, after due notice to all parties in interest, to determine the status of said land at the date of the selection by said Northern Pacific R. R. Co. As was said in the *Allen* case (*supra*) "if the land was at that date free from the settlement claim I see no reason why the railroad company should not get the land."

Upon the receipt of the record of said hearing, together with the opinion of the local officers upon the evidence submitted thereat, you will re-adjudicate the case.

The decision of your office is modified accordingly.

*HOMESTEAD CONTEST—RESIDENCE—DURESS.***DORGAN v. PITT.**

Actual violence is not necessary to constitute duress. It may be brought about by threats, and it is sufficient that the threats be such in character as are calculated to operate on a person of ordinary firmness, and inspire a just fear of loss of life or great bodily injury.

Failure to establish and maintain residence, by personal presence on the land, cannot be construed as an abandonment when resulting from duress.

Secretary Vilas to Commissioner Stockslager, April 12, 1888.

I have considered the case of William H. Dorgan v. Cressens G. Pitt, involving the E. $\frac{1}{2}$ of NW. $\frac{1}{4}$ and lots one and two of Sec. 31, T. 24 N., R. 23 W., North Platte district, Nebraska, as presented on appeal by Dorgan from the decision of your office, dated May 1, 1886.

The record shows that on March 31, 1883, Cressens G. Pitt made homestead entry for said tract, and on October 6, 1884, William H. Dorgan initiated contest against the same, charging abandonment and failure to establish a residence on the land since date of said entry.

* * * * *

It further appears from the record that there had been three pre-emption filings placed on the tract in question, the first by one Mary Hamilton, July 20, 1880, alleging settlement the 18th of the same month; the second by the claimant, October 11, 1882, alleging settlement June 15, of same year; and the third by one James Murphy, July 19, 1882, alleging settlement on the first day of same month.

* * * * *

The testimony in the case is exceedingly voluminous, and in some respects a little conflicting. The claimant admits that he did not establish and maintain his residence on the land, until a short time previous to said hearing, but claims that he was unlawfully prevented from so doing by threats of personal violence, made by said James Murphy and his father Patrick Murphy, who seem to have been living on and in possession of the land.

The evidence shows that Pitt went on the land soon after his entry and took preliminary steps towards effecting a settlement and establishing his residence, and succeeded in breaking several acres of the tract, but, by reason of the actions and threats of the said Murphys, he was so intimidated that he left the land and neighborhood, and did not return, until after the Murphys had vacated; that persons employed by Pitt to work on the tract were driven away by the Murphys, and claimant, himself, was at one time violently assaulted by the elder Murphy and driven from the land; that said elder Murphy's reputation was that of a dangerous, violent man, who often took matters in his own hands, and endeavored, by a system of terror and intimidation, to accomplish his purposes, when he could not do so by peaceable means; that he is

a large man, weighing about two hundred and twenty-five pounds, and claimant is small and weighs only about one hundred and twenty-five pounds; that he made repeated threats that he would kill claimant if he did not keep off the land in question, and that these threats being brought to the knowledge of claimant, he sought the advice of his friends and those acquainted with Patrick Murphy's dangerous character, in regard to persisting in his attempts to establish his residence on the land, and was advised that he had best not do so, and that if he did he would certainly be killed.

It is apparent to my mind from the testimony, that Pitt never intended to relinquish or abandon his claim to the land, and that his failure to establish and maintain an actual residence by continual personal presence thereon was caused by the acts and threats of violence on the part of said Murphys.

The testimony further shows that said James Murphy was not a qualified pre-emptor, being under the age of twenty-one years, when he made his said pre-emption filing, and being therefore a mere trespasser, the claimant had a superior right to the land.

It is a well settled principle that actual violence is not necessary to constitute duress. It may be brought about by threats, and it is sufficient that the threats be such in character as are calculated to operate on a person of ordinary firmness and inspire a just fear of loss of life, or great bodily injury. The facts disclosed by the testimony in this case were, in my opinion, amply sufficient to fill the mind of claimant, or any man of ordinary firmness, with the belief that any further attempts to go upon this land would render him liable to great bodily injury, and probably endanger his life.

I think, therefore, his failure to maintain a residence by means of an actual personal presence on the land, prior to the vacation thereof by the Murphys, is sufficiently explained, and I concur in your conclusions and affirm your judgment.

PRE-EMPTION CONTEST—SECOND FILING.

SHELTON *v.* REYNOLDS.

The voluntary abandonment and relinquishment of a pre-emption claim, duly protected by valid settlement and filing, precludes a further exercise of the pre-emptive right.

By the terms of section 2261 R. S. second filings are prohibited, not only on lands subject to private entry, but on all lands subject to pre-emption.

Secretary Vilas to Commissioner Stockslager, April 12, 1888.

I have considered the case of Joel N. Shelton *v.* Martin Reynolds, as presented by the appeal of the latter from your decision, dated July 3, 1886, holding for cancellation his pre-emption filing and cash entry for

the E. $\frac{1}{2}$ of NW. $\frac{1}{4}$ and SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, Sec. 12, T. 113 N., R. 60 W., Huron, Dakota.

It appears that Reynolds, on the 29th of June, 1882, filed his pre-emption declaratory statement, No. 18,675, for the NE. $\frac{1}{4}$ of Sec. 17, T. 112, R. 60, Mitchell series, alleging settlement June 19, 1882.

On April 27, 1883, he made the filing, No. 3808, for the tract now in question, and first described herein, alleging settlement on April 26, 1883.

November 10, 1883, he made cash entry, No. 5589, under said filing No. 3808, paid for the land, and received final certificate.

In September, 1884, the local office issued a notice to Reynolds to the effect that Joel N. Shelton had filed an affidavit, duly corroborated, charging that said cash entry, No. 5589, was perfected through fraud and in violation of law, in that he had previously, to wit, on June 29, 1882, filed for another tract, being the NE. $\frac{1}{4}$ of Sec. 17, T. 112, R. 60, as already described, and that by said filing Reynolds had exhausted his pre-emption right. This notice, it appears, was issued pursuant to an order from your office, dated August 9, 1884, directing a hearing. A hearing was had as directed, and upon the evidence adduced thereat the register and receiver recommended that the filing and cash entry of Reynolds be canceled.

On appeal, finding that at the time he made the filing upon which his cash entry is based, Reynolds had exhausted his pre-emption right, you affirmed the action below and held the filing and cash entry for cancellation. From that action Reynolds appeals to the Department, and avers that your decision is error :

1. In ignoring the affidavit and testimony of Reynolds, as to his bona fides in the premises.
2. In deciding the case upon the record without considering the abstract given claimant by an employee or officer of the local office.
3. In not reversing the action of the local office and holding the entry valid.

The testimony of Reynolds is to the effect that, although he executed a declaratory statement in June, 1882, for a tract upon which he had previously made settlement, he was by his attorney given to understand that by reason of a pending transfer of a portion of the territory embraced in the jurisdiction of the Mitchell land office to the Huron office, which transfer included the tract covered by his filing, his said filing had not gone of record, and after waiting a month or two he abandoned his settlement and left the locality ; that before making his second filing he procured from the Huron office an abstract which failed to show that he had ever put a filing of record ; that he thereupon made his second declaratory statement for another and different tract of land, which declaratory statement was duly put of record, and cash entry of the land covered thereby was made in November, 1883, as has been stated. His attorney in the matter of his first filing testifies that he

prepared for Reynolds his declaratory statement, which, having been duly executed, was by him, the attorney, sent to the Mitchell office, where it went of record as declaratory statement No. 18,675, and the receipt therefor was shortly after returned to him; that he delivered the same to Reynolds; that soon afterwards Reynolds came to him and stated that he was going up on the Northern Pacific Railroad, and that he had sold his claim to one Doctor Bullard, and asked him (the attorney) to make out the necessary papers; that he drew a relinquishment and retained the same in his possession, until Reynolds and Bullard completed their trade; that afterwards Reynolds went away, and some time later returned from up north and upon his said return told witness that "Bullard had beat him out of his claim."

The records show that said first declaratory statement was duly put of record, and with the papers before me is the relinquishment of Reynolds of his claim under his said declaratory statement.

Reynolds, on the other hand, testifies that after making his declaratory statement, he frequently called on his attorney to learn if said declaratory statement had been filed in the local office, and was each time told that nothing had been heard from it, and that as soon as it was recorded he would hear from it; that about July 28, 1892, his attorney stated that he did not think the declaratory statement had gone of record, and that it probably would not until the land office opened at Huron; that in about two months claimant told his said attorney to stop his filing and not let it go through; that he did not want to lose his right and would not be there, as he was out of money and could not wait until the Huron office should open; that in August he went to the northern part of the Territory, and afterwards to Illinois, and in short that he had acted in good faith throughout, believing that he had not exercised his pre-emption right, and that he was therefore entitled to make a second declaratory statement as he did, and to file and have the benefit of the same.

The foregoing indicates the contradictory and conflicting character of the testimony. Whatever of doubt is raised by these contradictions must be resolved by the record facts.

These show that Reynolds had before making the filing in question made and filed a declaratory statement for another and different tract of land, and that he relinquished over his own signature all right, title, or interest, in and to the land covered by said first filing. After having made, as he claimed, at the date of said first filing and as he now states, a valid and bona fide settlement he voluntarily abandoned that settlement and the claim initiated thereby. The excuses, which he offers for so doing, while they tend to show that he was acting honestly and without any intention of contravening the law, nevertheless do not present such a case as would warrant this Department on the facts as found in recognizing as valid and legal his second filing and the entry made thereunder. He was in a position, by reason of his settlement to hold

the land, even though there had been delay in getting his filing of record, as he states his attorney represented to him there was. He could lose no rights, except by his own act. Those he did lose, by his relinquishment and voluntary abandonment.

In view of these admitted facts, it will not avail him, so far as his legal rights are concerned, to say that before making his second filing he procured an abstract made by a clerk or employee in the Huron land office, which abstract did not show the first filing.

The record must, under the circumstances, be taken and acted upon as it is, not as claimant saw it. It shows that, before making the filing in question, he had exhausted his pre-emption right by having made a previous settlement and filing on a different tract of land. His filing, No. 3808, and the cash entry made thereunder, must therefore be declared invalid, because made in violation of section 2261 of the Revised Statutes, which provides that, "No person shall be entitled to more than one pre-emptive right by virtue of section 2259; nor where a party has filed his declaration of intention to claim the benefits of such provisions, for one tract of land, shall he file, at any future time, a second declaration for another tract."

The supreme court, in *Baldwin v. Stark* (107 U. S., 463), construing the section above cited, held that it is more comprehensive than the similar language in the act of 1843, which was the subject of the ruling of the court in the case of *Johnson v. Towsley* (13 Wall., 72), and that the limitation fixed by that decision is not applicable under the law as contained in Sec. 2261 of the Revised Statutes, which is clear in meaning and must be construed according to its terms to embrace not only lands subject to private entry, but all lands subject to pre-emption.

Your decision is, for the reasons stated, affirmed.

COAL LAND ENTRY—PROOF OF CITIZENSHIP.

WILLIAM H. MOSLEY ET AL.

Proof of citizenship, in coal land entries, is sufficient, if made in due conformity with the regulations prescribed for carrying into effect the law providing for the sale of coal land; compliance with the additional requirements of the mining regulations not being requisite thereto.

Secretary Vilas to Commissioner Stockslager, April 13, 1888.

I have considered the appeals of William H. Mosley and John H. Mosley, from your office decision of August 16, 1886, requiring claimants to furnish proof of citizenship in manner prescribed by the mining regulations in default of which, coal entry No. 4 John H. Mosley, for Lots 1 and 2, Sec. 22, T. 147 N., R. 84 W., and coal entry No. 5, Wm. H. Mosely, for the NE. $\frac{1}{4}$ of Sec. 22, T. 147 N., R. 84 W., Bismarck, Dakota land district, would be held for cancellation.

These parties seem to have strictly complied with all the requirements set forth in the circular approved July 31, 1882 (1 L. D., 637), prescribing rules and regulations for carrying into effect the provisions of the law

providing for the sale of coal lands. Revised Statutes, Sections 2347 to 2352, inclusive. Having done this they cannot justly be required to do anything more.

The proof of citizenship consists in each case of the affidavit of the claimant corroborated by two witnesses, stating that he claimant is a native born citizen of the United States.

The mining circular approved October 31, 1881, provided that the affidavit of the claimant might be taken "before the register and receiver, or any other officer authorized to administer oaths within the land district".

By an act approved April 26, 1882 (22 Stat., 49), it was provided: "That applicants for mineral patents, if residing beyond the limits of the district wherein the claim is situated may make any oath, or affidavit required for proof of citizenship, before the clerk of any court of record, or before any notary public of any State or Territory," and a circular (dated May 9,) approved May 26, 1882 (1 L. D., 685), was promulgated for the purpose of carrying into effect this provision.

The only particular in which these affidavits fail to conform to the requirements of the mining circular is in that they do not show when, and the place where the respective applicants were born or their present place of residence.

The coal land circular approved July 31, 1882, does not either in the forms of affidavits prescribed, or in any of its regulations require these facts to be shown.

The affidavits offered were sworn to before the clerk of the circuit court of Monroe county, Wisconsin, and are in exact conformity with the forms provided for in said coal land circular. I can find no authority, or good reason, for requiring anything more of the applicants in this regard, and must therefore reverse your said office decision, and direct that patents issue to the respective claimants.

PRE-EMPTION—CONTIGUITY—AMENDMENT OF FILING.

SVANG v. TOFLEY.

Under the regulations of the Department, tracts embraced within a pre-emption entry must be contiguous.

Tracts cornering on each other are not contiguous.

The settlement of a pre-emptor cannot extend to non-contiguous tracts; and the right to include such tracts within an amended filing can not be exercised in the presence of the intervening adverse claim of another who has in all respects complied with the law.

Secretary Vilas to Commissioner Stockslager, April 13, 1888.

* * * * *

April 15, 1882, John A. Tofley filed declaratory statement for NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 21, NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$ and SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 22, T. 123 N., R. 57 W., same district, alleging settlement August 4, 1881. It will be noted that the last two described forty acre tracts are not contiguous to the other tracts covered by this filing.

On July 24, 1882, Ole H. Svang made homestead entry for the W. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 22, and S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 15, T. 123 N., R. 57 W. This entry conflicted with the filing as to the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$ of said section 22.

July 28, 1882, Tofley applied to amend his filing so as to cover the N. $\frac{1}{2}$ SW. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, and SW. $\frac{1}{4}$ NE. $\frac{1}{4}$ Sec. 22, same township and range, thus rendering the tracts embraced in his filing, contiguous. The amendment was on September 11, 1882 allowed by your office, subject to any prior valid adverse claim.

On May 22, 1884, Tofley made proof and cash certificate issued thereon May 28, 1884.

Svang protested against the proof but the local office did not order a hearing. Your office, however, by letter of January 9, 1885, directed that a hearing be had to determine the rights of the respective claimants. Upon the testimony submitted the local officers recommended that Tofley's entry be canceled as to the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$ of said Sec. 22, the tract in dispute. Your office by letter of May 4, 1886, reached the same conclusion.

The testimony showed that within a few days after entry Svang went on to the land claimed by him, built a substantial house on the tract in dispute, made other valuable improvements, and took up his residence there; and that at the date of his entry there were no improvements on said tract. The rights of Tofley must therefore be determined by the status of his claim at the date of Svang's entry.

At that date the tracts embraced in his filing were not contiguous. It is a regulation of this Department co-existent with the pre-emption law itself that the tracts embraced in an entry under that law must be contiguous. (Hugh Miller 5 L. D., 683.) The claim of Tofley as it existed at said date, the tracts not being contiguous, could not have ripened into an entry under the law. His actual settlement and improvements were not on the eighty acres of which the tract in question forms a part. I am, therefore, of opinion that his claim to this tract cannot be maintained against another who made entry prior to the application to amend and in all respects complied with the law. As against such intervenor the pre-emptor could hold only such contiguous tracts as were embraced in his filing and covered by his settlement.

For the reasons herein stated the decision appealed from is affirmed.

FINAL PROOF—NEW PUBLICATION OF NOTICE.

RICHARD NOLTE.

The testimony of the witnesses on final proof, not having been taken before the officer named in the notice, new publication is required, when, in the absence of protest, the proof already submitted may be accepted.

Secretary Vilas to Acting Commissioner Stockslager, March 13, 1888.

Richard Nolte, who had filed declaratory statement for the SW. $\frac{1}{4}$, Sec. 12, T. 114, N., R. 64 W., Huron, Dakota, advertised that his proof

would be made February 11, 1884, before the clerk of the district court at Ashton, Dakota, and that of his witnesses before Don. H. Porter, notary public, at Crandon, Dakota, on the same day.

The claimant made his proof at the time and place advertised. His witnesses, however, instead of appearing before Don. H. Porter made proof before Jacob Keller another notary public.

By letter of December 22, 1885, you rejected the proof because of such irregularity.

The claimant filed affidavits explaining that the proof was made before Mr. Keller because Mr. Porter was not in the Territory upon the day named, and that no protest was made to said proof.

By letter of April 13, 1886, you modify your decision of December 22, 1886, and require claimant to make new publication of intention to make final proof, such notice to be duly posted in the local office, but if no one appears to protest against or contest said entry on the day named in the said new notice, new proof need not be made.

From this decision the appeal is taken.

The proof is satisfactory except for the irregularity that has been referred to. Another publication of notice of intention to make final proof will give opportunity for any one who may desire to do so to protest against the acceptance of the proof. As the proof in the first instance, was not made before the officer before whom it was advertised to be taken, it is possible that some one may have been denied the opportunity of protesting. The mode of procedure indicated by your decision obviates this difficulty without imposing any considerable hardship upon the claimant. I accordingly affirm your decision.

FINAL PROOF—EFFECT OF ADVERSE CLAIM.

JACOBS v. CANNON.

New final proof is not permissible in the presence of an adverse claim, where the proof submitted fails to show substantial compliance with law.

The case of Tupper v. Schwarz overruled.

Secretary Vilas to Commissioner Stockslager, April 16, 1888.

In the case of William M. Jacobs v. Caleb L. Cannon, appealed by Jacobs from the decision of your office, dated May 17, 1886, the record discloses the following material facts:

On April 1, 1884, Cannon filed pre-emption declaratory statement No. 6829, for the SW. $\frac{1}{4}$ of Sec. 26, T. 29 N., R. 7 W., Niobrara land district, Nebraska, alleging settlement three days prior to that time. On October 8, 1884, appellant made homestead entry for the same tract. July 10, 1885, Cannon tendered final pre-emption proof against the acceptance of which appellant protested, and the same day—and continuing from day to day—a hearing was had to determine the rights of the respective parties.

* * * * *

The local officers find from the evidence that Cannon's "good faith is well established; that his absences are satisfactorily accounted for, and the same are considered a constructive residence; that the proof offered by Cannon is satisfactory and should be allowed, and the entry of Jacobs canceled."

Your office is not satisfied that Cannon "has had a continuous residence, or made the tract his actual home," but not being "sufficiently satisfied of his want of good faith" you "award him the tract subject to his making new proof within the lifetime of his filing showing full compliance as to residence, and hold the entry by Jacobs subject thereto." In support of this ruling you cite *Tupper v. Schwarz* (2 L. D., 623).

In cases where no protest is offered against the acceptance of final proof, and the validity of the entry or filing, and the regularity and sufficiency of the proof, is in no manner contested, a party may be permitted to make new or supplemental proof, but in the presence of an adverse claim this cannot be allowed. If a clear preponderance of the evidence in this case shows that there has not been a substantial compliance with the pre-emption law on the part of Cannon, then the appellant has the legal right to have the entry canceled. *Wade v. Meier* (6 L. D., 308). The case of *Tupper v. Schwarz* supports your ruling, but it was in effect overruled by the case above cited and is now expressly overruled.

The evidence in this case, in my opinion, shows the settlement, inhabitation, and improvement required by section 2259, of the Revised Statutes.

The decision of your office rejecting said proof is therefore reversed, appellant's homestead entry directed to be canceled, and Cannon's entry passed to patent.

TIMBER CULTURE—FINAL PROOF.

HENRY HOOPER.

The eight years of cultivation, required under the timber culture law, must be computed from the time the required acreage of trees, seeds, or cuttings, are planted. A requirement that the proof should show that the trees, after proper cultivation for the statutory period have attained a specific height, or size, is not admissible under the timber culture law.

Secretary Vilas to Commissioner Stockslager, April 16, 1888.

In the case of Henry Hooper involving the question of the sufficiency of the final proof tendered by him in his timber culture entry No. 146, for the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, and Lot 8, all in Sec. 18, T. 21 N., R. 18 W., Grand Island land district, Nebraska, the record shows the following facts:

Entry was made January 26, 1878, and final proof tendered May 31, 1886.

The final proof shows the following facts :

Forty acres of land were broken the first, and ten acres the second year after entry. In April, 1879, one acre, and in April, 1880, twelve acres of the tract were planted to trees; ground cropped and in good condition. The trees have since been cultivated and kept in a growing condition. Some were killed by drought in 1880, and sixteen hundred were replanted in the spring of 1881. In 1883 they were damaged by hail. At the time of the final proof there were fifteen hundred trees to the acre, in a healthy, growing condition, which averaged about two inches in diameter, and six or seven feet in height, some of them being five inches in diameter and fifteen feet high. The trees consist of cottonwood, box-elder, black-walnut, ash and elm.

The proof was rejected by the local officers "for the reason that the trees have not reached the size required by the ruling of the Department—namely: They should average three inches in diameter and twelve feet high, whereas they are but two inches in diameter and six or seven feet high."

You affirm this decision and direct the local officers to notify appellant "that he will be allowed to make new proof on or before January 26, 1891, if he can show that his trees are of sufficiently large size to require no further cultivation to live and thrive."

The second section of the act of June 14, 1878 (20 Stat., 113) among other things provides :

That no final certificate shall be given, or patent issued, for the land so entered, until the expiration of eight years from the date of such entry; and if, at the expiration of such time, or at any time within five years thereafter, the person making such entry, or, if he or she be dead, his or her heirs or legal representatives, shall prove by two credible witnesses that he or she or they have planted, and, for not less than eight years, have cultivated and protected such quantity and character of trees as aforesaid; that not less than twenty-seven hundred trees were planted on each acre, and that at the time of making such proof there shall be then growing at least six hundred and seventy-five living and thrifty trees to each acre, they shall receive a patent for such tract of land.

This language is used with reference to that in the first section of the act, which directs the patent to be given to one

who shall plant, protect, and keep in a healthy, growing condition for eight years ten acres of timber, on any quarter-section of any of the public lands of the United States, or five acres on any legal subdivision of eighty acres, or two and one-half acres on any legal subdivision of forty acres or less, * * * at the expiration of said eight years, on making proof of such fact by not less than two credible witnesses, and a full compliance of the further conditions as provided in section two.

It is true that this plain language was, at one time, interpreted to refer the beginning of the eight years to the first preparation of the

land for planting, so that the time would begin to run from the first breaking, and instead of eight years of a "healthy, growing condition" of the timber, but four or five years might occur; (see Charles E. Patterson, 3 L. D., 260; Peter Christofferson, Ibid., 329) and the appellant's proof was proffered after such had been the decision of the Department. But he can claim nothing from that, unless that decision were correct; because his entry was not made upon the faith of it, but under the law; and, inasmuch as his proof was rejected by the local officers, he can have suffered no injury rightfully attributable to that ruling, except the inconvenience of his attempt to sustain his proof.

The Department now requires, and too manifestly in accord with the terms of the act to need renewed discussion, that the eight years of cultivation must be computed from the time the full required acreage of trees, seeds or cuttings are planted. (Par. 22, Cir. June 27, 1887, 6 L. D., 284.) Under this interpretation, the appellant's proof is clearly insufficient, as it shows a cultivation of the three different plantings of seven, six, and five years, respectively, instead of eight years' cultivation of ten acres of planted trees. It must, therefore, be rejected, and your decision to that effect is affirmed.

I can not agree, however, that it is admissible to require that the trees should, after the full eight years of cultivation "in a healthy, growing condition," necessarily attain any particular height or size. If one height or one size may be demanded, any other might be; which would add a requirement not demanded by the law, and might operate to deny the entryman a patent when entitled to it under the clear language of the first section. The statute is so plain there hardly seems necessity for anything more than its fair application to the facts.

CONTEST—PRACTICE—EVIDENCE—LOCAL OFFICERS.

TANNEHILL *v.* SHANNON.

In the trial of a contest case the local officers act judicially; and while in certain cases they would be fully authorized to inspect the land involved, if they deemed such action necessary, and for that purpose could adjourn the hearing and give notice to the parties of the time when they would make such inspection, yet they should not, after the case is closed, of their own motion, and without notice to the parties, inspect the land and base their judgment upon the the result of such inspection.

Secretary Vilas to Commissioner Stockslager, April 17, 1888.

I have considered the case of John Tannehill *v.* Michael J. Shannon, as presented by the appeal of the latter from the decision of your office, dated May 14, 1886, holding for cancellation his timber culture entry, No. 5470, of the NE. $\frac{1}{4}$ of Sec. 21, T. 105 N., R. 61 W., made September 10, 1880, at the Mitchell land office, in the Territory of Dakota.

The record shows that Tannehill initiated a contest against said entry on February 6, 1885, alleging that the entryman "has not during the third year after entry, nor up to the present time planted trees, seeds, or cuttings on the first five acres, nor during the fourth year or up to the present time planted trees, seeds, or cuttings on the second five acres, nor cultivated any trees on either five acres up to the present time."

At the hearing, the contestant filed an amended affidavit, alleging "that no cultivation was done on the second five acres of plowing on above tract during the third year after entry."

Testimony was offered by both parties at said hearing, and, upon the evidence submitted, the receiver decided in favor of the claimant, while the register, being unable to reconcile the conflicting testimony, after the case was closed visited said claim and from his own personal observation, in addition to the evidence submitted, found that the entryman had not complied with the law, and that said entry should be canceled.

Your office, on appeal, found that the testimony submitted by the contestant fully sustains his said allegations; that the testimony of the witnesses for the claimant—most of whom were his relatives—showed a complete compliance with the requirements of the law; that it was apparent that the witnesses for the contestant or the claimant testified untruthfully, either ignorantly, or willfully; that it was not surprising that the register was unable to determine the real facts in the case from the testimony of the witnesses, and therefore he made a personal inspection of said land to ascertain its true condition, and that he was satisfied that said land had not been properly prepared and planted as the law requires.

Your office further referred to the register's letter of transmittal, in which he states that after visiting said claim, he called the attention of the receiver to the facts concerning said land, which he had ascertained since the trial of said case, and asked the receiver to visit said claim before writing his decision; that the receiver declined to do so, for the reason that his decision must be rendered upon the evidence in the case; that extraneous circumstances not in evidence can not be considered, and that if the witnesses have committed perjury, they should be duly prosecuted.

Your office refused to sustain the position of the receiver, and held that it was the duty of both officers "to make all reasonable effort to discover the truth and to defeat fraud and perjury," citing instructions of your office (3 L. D., 133); (*id.*, 211); (*ibid.*, 220).

In the register's letter of transmittal, dated August 10, 1885, he states that "The trial was had before me and I was satisfied from the demeanor of the claimant, and his witnesses, that there was a fixed purpose to hold this land by reckless perjury," and the attention of your office is called to the affidavit of Benjamin F. Bynum, accompanying said letter. Bynum avers that he wrote the testimony in said contest

case; that just before the case closed, the register, who was present during the trial, notified the attorneys for the parties that it was utterly impossible for him to arrive at the true facts, owing to the positive and conflicting statements of the witnesses; that "he was satisfied somebody had done bad and unscrupulous swearing, and that he should make a visit to the claim and fully inspect it," on the following Sunday, and requested them to be present; that the affiant, at the request of the register, went with him twice to said claim, and that he has "carefully read the register's opinion in that case and unhesitatingly declares that he has described the claim truthfully, giving the claimant full justice."

Said instructions of your office, dated April 3, and December 3, 1884, and October 6, 1886, relate to the duty of officers in taking the final proof, and also relate to desert land applications, and are inapplicable to contest cases.

The testimony in the case is contradictory, but the weight of the evidence submitted at the trial is clearly with the claimant. The record of the testimony and the decision of the register fail to show that the attorneys of said parties were advised that an inspection of the claim would be made by the register, and the only evidence in the record tending to show that fact is the ex-parte affidavit of the clerk who wrote the testimony, which was filed after said hearing was closed.

In the trial of a contest case the local land officers act judicially, and while in certain cases they would be fully authorized to view the claims, if they deemed such action necessary, and for that purpose could adjourn the hearing and give notice to the parties of the time when they would make such inspection, yet they should not, after the case is closed, of their own motion, and without notice to the parties, inspect the ground and base their judgment upon the result of such inspection.

This Department has repeatedly held that an entry should not be canceled upon a special agent's report, and the same principle is applicable to the report of the local officers, when such report consists of matters not in evidence at the hearing.

The letter of transmittal, and said affidavit accompanying the same, are sufficient to warrant this Department in directing that a further hearing be had to determine the true status of said land. You will therefore direct a rehearing in the case, after due notice to all parties. Upon the receipt of the testimony, together with the report of the local officers thereon, you will re-adjudicate the case.

The decision of your office is modified accordingly.

FINAL PROOF—RES JUDICATA—EQUITABLE ADJUDICATION.

BERTHE GUNDERSON.

In the absence of any allegation of fraud, or wrong to an adverse claimant, the Department should not, *sua sponte*, and after the lapse of a considerable period, re-open cases formally decided in the regular course of business.

The failure to submit proof on the day named in the notice, having been once satisfactorily accounted for, and the proof accepted, and no protest having been filed, the entry may be sent to the Board of Equitable Adjudication.

Secretary Vilas to Commissioner Stockslager, April 17, 1888.

I have before me the appeal of Berthe Gunderson from your decision of June 18, 1886, holding for cancellation her pre-emption cash entry, No. 9934, of May 31, 1884, for the NE. $\frac{1}{4}$ of Sec. 11, T. 149 N., R. 55 W., Grand Forks district, Dakota, unless within sixty days she should satisfactorily show "that the obstacles" which prevented her from making proof on the day advertised "were caused by dispensations of Providence which could not be averted"; and, for the contingency of this objection being obviated, making the following order:

She will be required to make re-publication of notice and posting in the local office, but new proof will not be required if no adverse claimant appears, and no protest is filed against said entry, on the day, and before the officer named in such notice, which fact should be certified by said officer.

It appears that said Gunderson offered her said final proof on the 22d day of April, 1884, and that under date of May 22, 1884, the Commissioner of the General Land Office ordered the acceptance thereof and the allowance of said cash entry thereupon. The fact that the proof had been taken on the day after the date named in the notice, appeared by the record then passed upon, and was accounted for by a sworn statement that the officer who was to take the proof was absent on the day named. It does not appear that any one attended to protest or has since made any objection or adverse claim, though nearly four years have elapsed since your office formally approved said entry, and more than two years had passed before your said decision re-opened the case for the purpose of making the objection.

In the absence of any grounds for charging fraud on the part of the entryman, and no adverse claimant having alleged that he was misled to his injury by the irregularity mentioned I do not think that this Department should, *sua sponte*, re-open cases formally decided in the regular course of business, after so long an interval.

Under all the circumstances I think this case a proper one to be submitted to the Board of Equitable Adjudication, and it will accordingly take that course.

The decision appealed from is modified accordingly.

TIMBER ENTRY—CHARACTER OF LAND.

ELLIS v. MOORE.

A tract of land containing patches of arable soil, which however aggregate a less quantity than those parts unfit for cultivation, is properly subject to entry under the act of June 3, 1878.

Secretary Vilas to Commissioner Stockslager, April 16, 1888.

I have considered the case of George Ellis v. Annie Moore, as presented by the appeal of the former from the decision of your office, dated June 14, 1886, rejecting his timber land application, filed October 17, 1883, for the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, of Sec. 27, T. 5 N., R. 10 E., Sacramento land district, California, so far as the same was in conflict with homestead entry, No. 3957, of the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of said section, made October 19, 1883.

Upon the protest of the said Annie Moore a hearing was had to determine the character of the land in conflict, and whether the same was subject to entry under the timber and stone act of Congress approved June 3, 1878 (20 Stat., 89).

* * * * *

It is fairly proven that there are some five or six acres of said land that, if cleared, would be fit for cultivation, and the question is presented, whether that fact will warrant the rejection of said timber land application.

The first section of said act provides for the sale of unoffered lands "valuable chiefly for timber, but unfit for cultivation" to certain persons in limited quantities, at \$2.50 per acre.

This act was construed by this Department in *Spithill v. Gowen* (2 L. D., 631) to contemplate such timber lands as are found in broken, rugged, or mountainous regions, where the soil, when the timber is cleared off, is unfit for cultivation, and not lands, though heavily timbered, where the soil is susceptible of cultivation. This case, decided on May 8, 1883, was cited with approval on February 23, 1884, in the decision of the Department in the case of *Hughes v. Tipton* (*ibid.*, 336), wherein it was held, among other things, that said act did not contemplate entries exclusively on land wholly unfit for cultivation after the timber has been removed, and that land unfit for ordinary agricultural purposes could be entered under said act.

In said last named case a comparison was made with the mining law, as to the value of the land for agricultural or mineral purposes, and it was stated that—

If a timber application should cover timbered land, whose soil was so thin, or so poor, or whose surface was so precipitous, rocky, or broken, as to unfit it for raising crops in the ordinary manner and quantity, it would be valuable chiefly for timber. Or again, if scattered here and

there were patches of arable land, but so that they aggregated a less quantity than those parts unfit for cultivation, the tract would be valuable chiefly for timber.

The local land officers, with the witnesses before them, with an opportunity of noticing their demeanor on the witness stand, upon the very conflicting evidence, have found in favor of the appellant, who made the first application for said land. If the land was subject to entry under said act, then Ellis is clearly entitled to acquire title to the same. *Shepley v. Cowen* (91 U. S., 330).

Tested by the principles announced in said departmental decisions (*supra*), it is quite evident that the land in question is "valuable chiefly for timber, but unfit for cultivation." The homestead entry should, therefore, be canceled, so far as the same conflicts with the timber application, or the homestead entry may be relinquished without prejudice.

The decision of your office is modified accordingly.

HOMESTEAD FINAL PROOF—CITIZENSHIP.

WILLIAM HELEY.

An entry allowed on secondary evidence of citizenship will not be disturbed, where good faith is manifest, and better proof of citizenship is not now obtainable.

Secretary Vilas to Commissioner Stockslager, April 16, 1888.

On the 4th of January last this Department directed the certification, under rules 83 and 84 of Rules of Practice, of the record in the case of William Heley, who made final homestead entry, and received final certificate No. 167, December 31, 1884, embracing the N. $\frac{1}{2}$ of SE. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of SW. $\frac{1}{4}$, Sec. 22, T. 7 N., R. 7 E., B. H. M., Deadwood, Dakota.

Said record is now before me. It appears therefrom that Heley made his original entry of said tract June 26, 1883; that he after the usual notice made final proof December 31, 1884, having a credit of sufficient military service to make the time of his actual residence, as shown by the proof, a compliance with the law; that his proof was accepted and final certificate was issued to him; that soon thereafter Heley sold the land; that said tract has since passed through several transfers, and such title as Heley had thereto is now in one W. F. L. Souter.

When the case came before your office for examination and action, the proof as to citizenship was regarded as unsatisfactory, and further proof on this point was called for.

Before notice of said call, the entryman, Heley, had died. Upon receipt of information of the death of the entryman, your office, by letter of May 12, 1886, to the register and receiver, rejected the proof and held the final certificate, which had issued thereon, for cancellation, be-

cause record evidence of citizenship had not been furnished. No other objection was made to the proof. August 25, 1886, your office canceled both the original entry and the final certificate.

An examination of the record shows that on final proof the claimant and his witnesses swore that he was a citizen of the United States. In his final homestead affidavit he swore, "I am a citizen of the United States."

In answer to the question: "Are you a native of the United States, or have you been naturalized?" he answered: "Naturalized. I served in the army four years."

On this point it would have been proper for the local officers to require the production of record evidence of naturalization, but this they omitted to do, apparently being satisfied with the parol testimony above referred to.

The record evidence, it appears, can not now be produced, for the reason that the entryman having died leaving no heirs, and no friends sufficiently familiar with his history to know in what court the record of his naturalization was made, it has become impossible to procure and furnish a transcript therefrom.

The proofs satisfied the register and receiver that the law had been fully complied with by Heley in every particular, and your office raises no objection, except as to the character of the proof relative to citizenship. The defect in the evidence, which was accepted by the local officers, was not that it did not fully and explicitly cover the question as to citizenship. It did this directly and specifically. But it was at that time secondary evidence, for presumably primary evidence in the shape of a copy of the court record of naturalization could and would then have been furnished, had it been required. That, however, for the reasons stated, can not now be furnished, though it appears diligent effort has been made to procure it.

No charge or even intimation comes from any source that the entryman was not at the date of his final entry duly qualified as a citizen. On the other hand, his testimony and that of his witnesses has in a measure been corroborated by the production of evidence showing that he had exercised the rights and privileges of a citizen by voting. Of course, this is not conclusive, but the offer and acceptance of a vote raises a strong presumption that it is legal and that the person voting is a citizen.

Though the evidence as to citizenship in this case is not the best that the case admitted of at the date of final proof, it is the best that can now be produced, and, in view of the manifest good faith of the entryman, of his having furnished all the evidence required of him by the government officers, and there being nothing to rebut his proofs in any particular, I am of the opinion, under the circumstances of the case, that it should be accepted. The action of your office is accordingly reversed, and the entry will be passed to patent.

TOWN-SITE—FINAL PROOF—RES JUDICATA.

KEITH v. GRAND JUNCTION.

Though the extent of the conflict between the respective claims may now differ from that existing at the time when the former decision of the Department was rendered, yet the validity of the respective claims, as against each other, was then involved, and as the Department had authority to determine the preference right of entry under each claim, considered in its entirety, such an adjudication, as between the parties, precludes the assertion of rights acquired subsequently thereto.

Final proof should not be submitted until after the expiration of three months from the filing of the township plat. An entry, however, allowed in violation of this rule will not be disturbed where it is apparent that all parties have had full opportunity to assert their claims.

A decision of the Secretary of the Interior awarding to a pre-emptor the right to make final proof, as of a given date, will not preclude his successor from considering acts performed after that date for the purpose of determining whether such subsequent conduct shows an abandonment of the claim or impeaches the *bona fides* of the prior settlement and residence.

Secretary Vilas to Commissioner Stockslager, April 17, 1888.

This case involves the right to the E. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 14 and the W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 13, T. 1 S., R. 1 W., Gunnison, Colorado, embraced in the declaratory statement of Wm. Keith, filed September 26, 1882.

Keith made settlement upon said tract October 6, 1881. During the same month—but subsequent to Keith's settlement—the Grand Junction town company, then incorporated, filed a declaration of occupancy under the local laws for the whole of said section 14. Keith gave notice of his intention to make final proof upon his pre-emption claim December 5, 1882, at which time the town-site claimant appeared to contest said filing, but no affidavit of contest was filed because Keith, by advice of his counsel, declined to offer proof.

The next day the town-site of Grand Junction, which had then become incorporated, made cash entry for all of said Sec. 14, except the N. $\frac{1}{2}$ of NE. $\frac{1}{4}$ taking in place of it the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 23. The town-site entry therefore embraced only the eighty acres in Sec. 14 covered by Keith's filing and made no claim whatever to the eighty acres in Section 13.

Keith instituted contest upon the ground that said entry conflicted with his prior declaratory statement as to the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 14. Upon this a hearing was ordered which was concluded June 12, 1883.

This case coming before the Department upon the appeal of Keith from the decision of the Commissioner in favor of the town-site claimants, it was held by Secretary Teller that Keith being the first occupant of the land in controversy, and there being no actual settlement for town-site purposes at the date of Keith's settlement, he was entitled to the preference right of entry as to the entire tract embraced in his

filing, and would be allowed to prove up his claim as of the date he attempted to do so, to wit, December 5, 1882. (3 L. D., 356.)

The town-site of Grand Junction filed a motion for review of this decision, but the Secretary after a thorough consideration of the case reaffirmed his former ruling, holding that the town-site claimants had never made a valid settlement upon said section prior to Keith's settlement, and that Keith's right of entry to the tract embraced in his filing began with his settlement and lasted until the right of pre-emption expired, thereby cutting off all intervening claims to the tract so appropriated. (3 L. D., 431.)

The preference right of entry of the E. $\frac{1}{2}$ SW. $\frac{1}{4}$ of Sec. 14, as between Keith and the town-site of Grand Junction, was directly adjudicated in the decision above referred to and is conclusive and binding upon the parties to this suit. As to this there can be no question.

But it is contended by the town-site claimants that as the eighty acres in Sec. 13, was not then embraced in the entry of the town-site but is now embraced in it, the case at bar presents new parties under a new entry and for different land, or in other words a different subject matter is now presented for the consideration of the Department from that considered by Secretary Teller.

The matter directly in issue in the decision above referred to was, the priority of right to the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 14, as between Keith and the town-site of Grand Junction; But while the right to the eighty acres in Sec. 13, was not directly in issue between Keith and the town-site, not being embraced in the town-site entry, it was directly asserted by Keith as being embraced in a filing under which he claimed the preference right as against the town-site to the land in controversy, and upon the claims thus presented—Keith claiming under his filing the right to the one hundred and sixty acres embraced therein, and the town-site making no claim to the eighty acres in Sec. 13, the right to which was directly asserted by Keith—the Secretary had the authority and jurisdiction in that case to determine as between the parties to it the preference right of entry as to the particular tract claimed, respectively, by each.

The parties to the former suit were Keith and the town-site of Grand Junction and they are the parties to this suit. The subject matter of the former suit was the claim of Keith to the one hundred and sixty acres embraced in his pre-emption filing, and the claim of the town-site to the six hundred and forty acres embraced in its entry, eighty acres of which conflict with Keith's, and that is the subject matter of the present suit.

If there has been a changed condition of the town site entry it cannot affect Keith's right because if Keith was entitled to make entry of the land embraced in his filing at the date of the former decision, he is entitled to make such entry now as no rights could intervene in favor of the townsite, if his right to enter at that time as against the town-site was clearly shown.

In answer to the position assumed by counsel that Keith could not make entry of land within the limits of a townsite, it is sufficient to say that at the time Keith's right to entry was initiated, the tract was not embraced within the limits of a townsite, there being no actual settlement on the land for townsite purposes, and to use the language of the Secretary in the former decision in this case "it was not the object of the law to withhold from pre-emption such lands as individuals might designate or select without authority, as the site for a probable or prospective site or town."

The preference right of Keith to enter the one hundred and sixty acres embraced in his declaratory statement was fully and finally adjudicated in favor of Keith as against the townsite company of Grand Junction, and there has been no change in the character of the parties or of the subject matter of the litigation since the decision of Secretary Teller to authorize his successor in office to review that decision upon the issues thereby settled and adjudicated.

Complying with the decision of Secretary Teller allowing final proof to be made as of the date of December 5, 1882, Keith subsequently offered final proof and made cash entry of the tract embraced in his filing, but the local officers having failed to make new publication of notice of intention to submit such proof, your office, acting upon affidavits filed by the townsite authorities, ordered a hearing to inquire into the validity of Keith's entry, but subsequently modified it by simply requiring Keith to make publication of notice and to submit final proof under such notice showing compliance with the law up to December 5, 1882, as required by the decision of Secretary Teller.

At said hearing testimony was submitted not only as to Keith's compliance with the law up to December 5, 1882, but also as to the priority of right of the respective parties and of Keith's compliance or non-compliance with the law as to residence and settlement since December 5, 1882.

The local officers found that Keith has shown compliance with the law, and recommended that his entry be allowed to stand.

Upon appeal therefrom by the town-site of Grand Junction you held that the question as to the priority of right having been settled by the decision of Secretary Teller of July 21, 1884, the evidence should have been restricted to Keith's compliance with the law in the matter of residing upon and improving his claim from date of settlement until December 5, 1882.

As the other issue raised in the case, to wit: that the requisite three months did not intervene between the date of filing of the township plat in the local office, and the date when Keith first gave notice that he would submit final proof; and that only four and a half months elapsed between the date the land became subject to legal settlement and the date when Keith gave notice of intention to submit final proof, you held that they were of a technical nature and that it is presumed

they were fully considered by the Secretary in deciding that Keith should be allowed to prove up as of December 5, 1882.

After a full consideration of the testimony you find that Keith's improvements and continuous residence on his claim up to December 5, 1882, sufficiently indicated his good faith, and that his occupancy of the claim since then part of the time in person and at other times by tenants, and there being no evidence that Keith has attempted to dispose of his claim refutes the allegation of protestants that Keith is a speculative and not a *bona fide* claimant. You therefore decide that he is entitled to the land embraced in his entry and so award.

From this decision the town-site appealed, alleging various grounds of error, all of which that are material to a proper consideration of this case, have been disposed of, except the following:

1st. That Keith submitted proof in less than three months after the filing of the town-ship plat.

2d. That he gave notice to submit final proof in less than six months after the date when a legal settlement could be made on the land, and

3d. That he has not complied with the law by making a continuous residence and settlement for six months after a legal settlement was established.

The only reason for not allowing proof to be submitted until after the expiration of three months from the filing of the town-ship plat is, than all settlers may have the full period of time allowed by law in which to file their declaratory statements; and a cash entry should not be received until the expiration of that time: but as all parties have had sufficient opportunity to assert their claims by filing, that is now an immaterial question in the consideration of this case.

The rule requiring six months residence prior to entry is a rule of the Department intended solely for the purpose of testing the good faith of the settler, and although Keith could acquire no rights by settlement prior to the date when the land was legally open to settlement, yet his settlement having been continuous and existing at the date the land was opened to settlement, his occupancy of the land prior to that time and the improvements placed thereon may be considered by the Department in determining his good faith. In this view of the case the rule was not violated by allowing Keith to prove up as of December 5, 1882.

The sole question remaining is whether Keith has complied with the requirements of the pre-emption law, as to settlement, residence, etc.

While I do not consider that the decision of Secretary Teller; that Keith should be allowed to prove up as of the date of December 5, 1882, binding upon his successor so far as to deny to him jurisdiction and authority to determine whether Keith has complied with the pre-emption law up to the date when he actually submitted proof, yet having offered proof of compliance with the law up to a certain period, in accordance with the direction of the Department, the proof

as to his acts subsequent to that period will only be considered by this Department so far as to determine whether such subsequent conduct showed an abandonment of the claim or impeached the *bona fides* of his prior settlement and residence, provided the proof shows that his inhabitancy, cultivation and improvements up to that date were sufficient to authorize the entry.

The testimony as to the settlement, inhabitancy, and cultivation of the tract by Keith from the date of settlement to December 5, 1882, is briefly as follows: Keith made settlement upon the tract the latter part of 1881, and although the land was not declared open to settlement until July 1882, yet Keith commenced at once to improve the tract by the erection of a log cabin which he completed in December, 1881; dug a well, cut and removed brush from around his cabin preparatory to cultivation and aided in the construction of a ditch for the purpose of irrigation. By December 5, 1882, he had improved the tract to the extent of from \$800 to \$1200, and had continuously resided on it, except for a short period, when he was at work in sight of his claim.

These facts do not seem to be contradicted by the town-site authorities, but they insist that he failed to cultivate the tract during that period and hence did not comply with the law in that respect.

The failure to cultivate or raise a crop during that period is explained by Keith upon the ground that the irrigation of the soil was essential to the raising of a crop. But as Keith had brought water on the land through considerable expense and exertion, the irrigation and clearing of the land may well be considered as sufficient compliance with the law in this respect.

After a full consideration of the testimony, I am satisfied that Keith acted in good faith and has shown a full compliance with the law up to December 1882, as found by the local officers and your office.

There is nothing in the testimony, as to the acts of the entryman since that date, showing that he has abandoned the land—or tending to impeach his *bona fides*—but on the contrary it tends to show that he was seeking to acquire title to the land for his own use and benefit, and not for the purpose of sale and speculation.

I affirm your decision.

SURVEY—ISLAND—RIPARIAN RIGHTS.

C. W. BEEMAN.

An application for the survey of an island will be denied where it appears that the title thereto is in the applicant as riparian owner.

Secretary Vilas to Commissioner Stockslager, April 18, 1888.

I am in receipt of your letter, dated February 23, 1888, transmitting for departmental action the application of Chancy W. Beeman for the survey of an island situate in the Arkansas river, in section 21 of township 26 south, range 26 west, in the State of Kansas.

From the application and accompanying affidavits, it appears that the island contains about twenty-three acres; that the improvements thereon consist of a fence and about seven acres "breaking," valued at about \$50.

The notes of a survey made by Charles Van Tromp, county surveyor for Ford county, Kansas, show that the width of the channel on the south side of the island is twenty-five links, and the depth thereof one and a half inches; that the channel on the north side of the island has a width of nineteen chains and a depth of fourteen inches.

The affidavits in the case set out that Beeman, the applicant for survey, is the owner of the land on the main shore south of and nearest to the island. That is, the island is only one rod (twenty-five links) distant from the land owned by him on the main shore.

It also appears that notice of this application was duly served upon and acknowledged by William A. Elliott, the owner of the land on the main shore opposite said island on the north, and that he has made no objection to the survey.

From the evidence your letter presumes, from the slight depth of the water ($1\frac{1}{2}$ inches) in the channel on the south side of the alleged island, at the time the survey thereof was made in December, 1887, that at certain seasons of the year the island is connected with the main land, and in view of the fact that the applicant for survey owns the main shore land nearest said island, and by reason of such ownership, would under the laws governing riparian rights probably become entitled to said island should it be permanently attached to the main land, you recommend that Beeman's application be granted and the survey ordered. You suggest that such course would avoid the possibility of other persons settling upon the island and causing trouble and litigation to the applicant.

The presumptions raised by you as to the ultimate result from the nearness of the island to the land owned by the applicant, and the shallowness of the water between it, seem to me furnish a reason for denying the application. If the land now belongs to the applicant, or should hereafter come to him under the laws relative to riparian rights, it would not be just to him to survey and order into market the island, and thus require him, if he got the land at all, to get it in competition with others and only as the highest bidder.

The Arkansas river in Kansas does not appear to be navigable, but whether so or not, can not probably affect the question here presented.

In the case of Frank Chapman, who was an applicant for the survey of an island in the Arkansas river in Kansas, the Department on the 20th ultimo (6 L. D., 583) held that the riparian rights of the owners and proprietors on either shore must be duly regarded in connection with an application for the survey of an island; that in such case in the absence of any statutory provision to the contrary the common law right of the riparian proprietors on either shore to the bed

of the river, *ad filum aquae*, should not be ignored, citing the case of Railroad Company *v.* Schurmeir (7 Wall., 272). The court in that decision used the following language: "Proprietors bordering on streams not navigable, unless restricted by the terms of their grant, hold to the centre of the stream;" and the rule there applied to land on a navigable stream would carry this island to the petitioner.

Feeling no doubt that under this rule and the facts as represented, the title must be regarded as being in this applicant as owner of the shore, there is not only no occasion for a survey, but it might, if made and the land put in market on his application, operate to disturb the right he now possesses; and the government having once sold to him or his grantors the same land, can not on the theory of a new survey of omitted land, rightfully now accept a new price from him or sell it to another.

The applicant needs no relief, and his application should therefore be denied.

SURVEY—MEANDERED SWAMP LAND.

PETER MEYER.

Marsh lands excluded from the original survey, and subsequently reclaimed, were subject to survey under the circular regulations of July 13, 1874.

The subsequent revocation of said circular will not defeat rights acquired thereunder. The case of G. W. Holland overruled.

Secretary Vilas to Commissioner Stockslager, April 19, 1888.

I have considered the appeal of Peter Meyer from your office decision of July 8, 1886, refusing his application for a survey of certain lands within the meandered lines of Sylvan lake, in T. 21 N., R. 34 E., Washington Territory.

The application to have these lands surveyed, transmitted by Meyer's attorney, by letter of January 26, 1885, sets up, in substance, that in the fall of 1876 the applicant first began to reclaim said land, which was marked on the plats as meandered and was known as a "tule swamp;" that said land was then covered by water to the depth of twelve to eighteen inches; that he dug a ditch, twelve feet wide, from four to eight feet deep, and one hundred and sixty rods long, which carried off the main body of water, and afterwards, by other ditching, he succeeded in draining the whole surface of said land sufficiently to plow and seed it to grass; that he has the land enclosed by a good fence, and that the greater portion is now in timothy meadow, and concludes by asking that said tract be surveyed and that he be allowed to enter the same by cash entry, when said survey is made.

In passing upon this application, it was said in your office letter of August 12, 1885:

In order to act intelligently upon the matter of the proposed survey, it will be necessary for Mr. Meyer to furnish this office with a diagram

of the lands alleged to have been reclaimed by him, showing their topography and position approximately; also additional affidavits of interested witnesses personally cognizant of the facts as to former marshy condition and alleged reclamation. . . . The question of the practicability of said survey will be considered on receipt of the additional information requested.

It is also stated in said letter that the official plat of said township shows the lands to be within the meander lines of Sylvan lake, and that the eastern extremity of said lake (the locality of said lands) is of a marshy character.

In response to your said office letter, Meyer filed the affidavits of three witnesses, fully corroborating his former statements, and stating the amount of land reclaimed to be about 111 acres, and the value of the work done about \$1500, but failed to file a diagram of the alleged reclaimed land as requested. On July 8, 1886, your office decided, "While the government has not parted with its title to the bed of Sylvan lake, or the marsh lands referred to, under existing regulations, said lake bed, marsh land or lands uncovered by the recession of the waters of said meandered lake (whether resulting from natural or artificial causes) are deemed unsurveyable," and refused his application. From that decision Meyer appealed.

On July 13, 1874, your office issued a circular (1 C. L. O., 69), saying "the beds of lakes (not navigable), sloughs, and ponds, over which the lines of the public surveys were not extended at the date of the original survey, but which from the presence of water at the date of such survey were meandered, are held to be the property of the United States; and whenever, by evaporation, or the operation of any other cause, natural or artificial, the waters of such lake, slough, or pond, have so permanently receded or dried up as to leave within the unsurveyed area dry land, fit, in ordinary seasons, for agricultural purposes, such dry land is subject to survey and sale under the general laws regulating the disposal of the public domain," and stating in what cases such surveys would be ordered, and prescribing the manner in which applications should be made.

In his report for 1877, your predecessor, Commissioner Williamson, stated that for reasons therein given it had been determined that such surveys should not further be authorized. No departmental decision seems to have been made directly approving the policy announced by Commissioner Williamson, until July 12, 1887, in the case of G. W. Holland (6 L. D., 20), where it was said that nothing appeared in the application to warrant a change of the rule adopted in 1877, of refusing to order surveys of the beds of meandered lakes. The facts surrounding said case are not set forth in the decision.

In the case now under consideration, the applicant went on the land under the provisions of the circular of July 13, 1874, he has expended a large sum of money, and has thereby reclaimed and made valuable a large tract of land that was before of no value, he has complied with

all the requirements of the regulations of the Department in force at the time he entered upon the land, with the exception of filing a diagram thereof, which failure is not in this case material, since the township plat, a tracing from which is attached hereto, shows sufficiently the position of said land and its relation to surrounding tracts. All the land adjacent to that sought to be surveyed, except Lots 1 and 2, Sec. 10, are public lands, and therefore the rights of adjacent owners are not involved except to that extent.

After a careful consideration of all the facts and circumstances surrounding this case, I am of the opinion that justice demands that the application for survey should be allowed, for which you will give the proper directions. The rule laid down in the case of G. W. Holland, *supra*, is, in so far as it conflicts with the views herein expressed, overruled. Your said office decision of July 8, 1886, is reversed, and the application allowed.

HOMESTEAD CONTEST—ACT OF JUNE 15, 1880.

CLEMENT v. HENEY.

The initiation of a contest against a homestead entry suspends the right of purchase under the second section of the act of June 15, 1880, until the final disposition of such contest.

Transferees claiming under a purchase made in violation of this rule, take nothing thereby, as they are bound to take notice of the pending suit against the original entry.

Secretary Vilas to Commissioner Stockslager, April 23, 1888.

I have considered the contest case of Andrew S. Clement v. Thomas Heney, on appeal by Heney from your office decision of April 15, and May 5, 1886, respectively, holding for cancellation his homestead entry No. 4464, for the NE. $\frac{1}{4}$, Sec. 18, T. 25 S., R. 16 W., and his cash entry No. 1601, for same tract in the Larned land district, Kansas.

Heney made homestead entry for said tract February 24, 1879. Clement filed contest affidavit October 27, 1885, and in pursuance of published notice hearing was set for January 23, 1886. On January 19, 1886, an attorney claiming to represent Thomas Heney, appeared before the local officers, presented proof under section 2 of the act of June 15, 1880, and received cash entry receipt, No. 1601, for the tract.

On the day set for hearing Clement appeared in person and with witnesses offered testimony. Heney did not appear.

The testimony showed that Heney had not made any improvements "except that he broke five acres and started a mud wall about two foot high, prior to July 1879," since which time he has wholly abandoned the land, left the State of Kansas and went to reside at Bridgeford, Maine. At the date of hearing the tract was vacant wild land, except

about five acres cultivated by a man who lived on an adjoining claim and who used it for his own private use and benefit.

The testimony of several witnesses, as well as the written admission of Heney, showed that long prior to November 2, 1885, he had sold and assigned to one E. H. McKibben, all of his interest in and to his homestead entry papers; and the testimony of several disinterested witnesses proved that McKibben had frequently offered to sell his assumed interest in said papers, long before the initiation of contest.

Upon the testimony adduced the register and receiver decided that the homestead entry of Heney should be canceled, because of abandonment fairly proven, and on April 15, 1886, your office concurred in said decision.

By letter of the register dated April 22, 1886, your office was informed as follows: "That on January 19, 1886, the defendant appeared and offered proof under section 2, act of June 15, 1880, for said tract, which was made of record cash entry No. 1601," that "the above case was inadvertently forwarded among the *ex parte* cases on April 1, 1886, instead of separate with a full statement of the case; I now ask for instructions. Shall I cancel on the records of this office cash entry No. 1601, made January 19, 1886, of said Heney, on the *ex parte* showing transmitted heretofore?"

On May 5, 1886, your office informed the register and receiver as follows: "Your action in allowing said entry pending the contest instituted by Clement October 27, 1885, was erroneous and irregular, and you are hereby directed to cancel the same and forward it to this office."

May 21, 1886, Heney was notified by mail of the cancellation of his said entries, and on July 15, 1885, Heney by his attorney W. P. Peters, appealed from said decision.

Upon a careful review of the record and testimony in this case I am convinced that your decisions were correct, as the question involved in this case is similar to that decided in the case of Freise *v.* Hobson (4 L. D., 580) also Roberts *v.* Mahl (6 L. D., 446), wherein it was held that the initiation of a contest suspended the right to purchase under the act of June 15, 1880, until the final disposition of such contest, and as Heney, or some one in his name purchased during the pendency of contest and four days prior to the day set for hearing, and before the case was finally adjudicated I concur in your decisions.

There is another question presented for my consideration in this case, viz: On March 31, 1887, John B. Bloss, Esq., as attorney, entered his appearance for Wilson and Whitehouse, claiming that they are *bona fide* transferees of Heney, and filed an argument to sustain Heney's entry, accompanying said argument is an affidavit such as is required by rule 102. He also filed a certified copy of a deed purporting to convey the said described tract to Wilson and Whitehouse, and which shows that the original deed was executed by Heney in York County,

State of Maine, February 5, 1886, and was entered for record in the office of the county clerk of Edwards County, Kansas, February 24, 1886.

He also filed a certified copy of tax receipt for \$2.81 paid by Wilson and Whitehouse, as taxes assessed on said tract for the year 1886, and he also filed an affidavit of having forwarded to L. H. Crouse, Esq., of Larned, Kansas, attorney for contestee, a copy of said argument.

The rights of the transferees could be no greater than those of the entryman. They were bound to take notice of the pending suit against the original entry; and as the facts, upon which the said cash entry was canceled, are not controverted, the petition of the intervenors must be dismissed.

Your decisions are therefore affirmed. The contestant will be allowed thirty days after notice of this decision to exercise his preference right of entry.

PRACTICE—PREFERENCE RIGHT—INTERVENING ENTRY.

BOOREY v. LEE.

Where an entry is allowed subject to the preferred right of a successful contestant, and such contestant subsequently applies to enter the land, due notice thereof should be given the intervening entryman with opportunity to show cause why his entry should not be canceled and the contestant allowed to perfect his entry.

Secretary Vilas to Commissioner Stockslager, April 24, 1888.

I have considered the appeal of Albert N. Boorey from the decision of your office, dated May 4, 1886, holding for cancellation his timber culture entry No. 4143, of the SW. $\frac{1}{4}$ of Sec. 22, T. 22 S., R. 32 W., made August 13, 1885, at the Garden City land office in the State of Kansas.

The record shows that Lee procured the cancellation of a prior timber culture entry; that he made application to enter said tract under the timber culture law, which was rejected by the local land officers on August 24, 1885, because:

The affidavit was sworn to June 27, 1884, and is over one year old, and claimant does not swear as to whether he is a native born or naturalized citizen of the United States. Applicant was contestant against the former timber culture entry, and his time as preferred claimant has not expired.

On appeal, your office, on December 8, 1885, reversed the action of the local land office and directed the register and receiver to allow Lee to enter said land under the timber culture law.

On March 17, 1886, the local office transmitted the appeal of said Boorey to this Department asking that his said entry remain of record. Your office, on May 4, 1886, advised the local land officers that, as the entry of Boorey was not reported by them in their letter, dated September 25, 1885, transmitting the appeal of said Lee, and as the same

had not been placed upon the records of your office at the date of the former letter—to wit : December 8, 1885, no action was taken with reference to Boorey's entry, and, therefore, his appeal was premature. Your office further held for cancellation the entry of Boorey for the reason that Lee made his entry on February 1, 1886, allowing Boorey the right of appeal.

On July 14, 1886, the local office transmitted the appeal of Boorey, and on December 8, same year, they forwarded the motion of Lee to dismiss the appeal of Boorey because notice of the same was not duly served on the appellee or his counsel.

Boorey filed his answer to said motion alleging that he "has never taken an appeal, never having had any reason to do so. His entry was regularly made of record, and still remains of record;" that Lee's said entry was placed of record by the direction of your office on February 1, 1886, without any notice to Boorey or his attorneys; that in February, 1886, Boorey was ordered by your office to show cause why his entry should not be canceled, whereupon he made a showing to your office and mailed a copy thereof as a matter of courtesy to said Lee.

It is somewhat difficult to reconcile said answer with the two appeals filed in the case by the attorneys of said Boorey. It is quite evident that under the rulings of this Department, two entries should not be placed of record for the same tract of land at the same time. Unquestionably, Boorey's entry was made subject to the preferred right of the contestant Lee. When, however, Lee applied to exercise his right of entry, Boorey was entitled to notice thereof in order that he might have an opportunity to show cause why his own entry should not be canceled, and the contestant allowed to enter the land. This, he was not permitted to do, and a hearing should be duly ordered to determine the rights of the respective parties. At said hearing Boorey will be allowed to show cause why his entry should remain intact, and the entry of Lee canceled.

Upon receipt of the testimony taken at the hearing with the report of the local officers thereon, your office will re-adjudicate the case.

The decision appealed from is modified accordingly.

TIMBER CULTURE ENTRY—AMENDMENT—SECTION 2372 R. S.

WILLIAM BARR.

The rule in section 2372 of the Revised Statutes which requires applications for amendment to be submitted to the register and receiver, and provides for the written opinion of said officers both as to the existence of the mistake and the credibility of each person testifying thereto, though not in terms applicable to timber culture entries, may well be applied to them, in proper cases, out of due caution.

Secretary Vilas to Commissioner Stockslager, April 25, 1888.

I have considered the appeal of William Barr from the decision of your office, dated October 12, 1886, refusing to allow his application to

amend his timber culture entry No. 1833, of the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 19, T. "161" N., R. 70 W., so as to cover instead, the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, and the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 19, T. "159" N. R. 70 W., Devils Lake land district, Dakota.

The record shows that said Barr filed his pre-emption declaratory statement No. 2739, for the SW. $\frac{1}{4}$ of Sec. 19, T. 161 N., R. 70 W., in said district on March 15, 1886, and on the same day made said timber culture entry. Subsequently he filed his application, dated May 18, 1886, to amend said entry and filing, the former to include the tract as aforesaid, and the latter to embrace in lieu of the tract included in said filing, the SW. $\frac{1}{4}$ of Sec. 17, T. 159 N., R. 70 W. Said application is verified and duly corroborated. The petitioner avers that his said entry papers and filing were prepared by a notary public who made a mistake in the number of the township; that the affiant settled upon the SW. $\frac{1}{4}$ of Sec. 19, T. 159, R. 70, and has continued such settlement to the present time; that said entry and filing were made in township "161" instead of "159" where the applicant resides and has made his improvements thereon; that as soon as he received the receiver's receipts for said tracts, he immediately returned the same to said notary and requested him to have the error in description corrected; and the applicant asks that his said entry and filing be amended so as to cover the land which he intended to enter under the timber culture law, and include in his filing the land upon which he had settled and which he intended to claim under the pre-emption law.

Your office, on October 12, 1886, refused said application as to the timber culture entry, but made no reference to the pre-emption declaratory statement. The application was refused for the reason that your office was not satisfied that any error had been made, and that if an error had been made "no considerable hardship appears to have resulted therefrom," and the applicant must stand by the entry as made.

If the allegations of the applicant be true, and there is no evidence to the contrary, then under the ruling of this Department in the case of A. J. Slootskey (6 L. D., 505) the change in said entry and filing should be allowed. In that case the Department held that:

If this application had been to amend the original entry in accordance with the original purpose of the entryman so as to designate the tract he had examined and intended to enter, and if no intervening right inconsistent with his proposed entry had been established, I think the application to amend should have been granted, certainly if he satisfactorily excused his contribution to the mistake, this would have been the rectification of a single error without injury to the rights of others, and would have been demanded upon the plainest principles of equity and the established usages of the Department as shown by various decisions.

It is shown that the applicant settled upon the land he intended to file for prior to the date of said filing; that the error was a clerical one misdescribing the land as to the number of the township, and I see no

good reason why said amendment should not be allowed if the land applied for was subject to settlement and entry at the date of said application.

Your office expresses doubt as to the existence of said error and the record fails to show that the evidence has been submitted to the register and receiver or that they have transmitted "their written opinion both as to the existence of the mistake and the credibility of each person testifying thereto," as required by section 2372, Revised Statutes; a rule which though not by that section applied to timber culture entries in terms, inasmuch as they were later provided by law, may well be applied to them in proper cases, out of due caution.

I have, therefore, to direct that said application and the evidence in support thereof be returned to the local land officers for their written report thereon, as above indicated. Upon receipt of the report of the register and receiver, you will again consider the application, and if no objection is found beyond what has been disclosed, allow the amendment.

The decision of your office is modified accordingly.

MINERAL ENTRY—EQUITABLE ADJUDICATION.

BUENA VISTA LODGE.

A mineral entry may be submitted to the Board of Equitable Adjudication where the law has been substantially complied with and no adverse claim exists, and the only defect is an erroneous description in the survey of the connecting line, such error being the result of an erroneous marking of a corner located by public survey, and it being shown that the mineral survey was made in accordance with the location notice and boundary stakes, and embraced the identical land originally located.

Secretary Vilas to Commissioner Stockslager, April 25, 1888.

I have considered the appeal of C. W. Pomeroy mineral applicant, from the decision of your office, dated September 20, 1886, holding for cancellation mineral entry No. 74, made by him upon the Buena Vista Lode claim on October 27, 1884, at the Hailey land office in the Territory of Idaho.

Your office finds that the survey of said claim was made on April 11, 1884, by the deputy United States mineral surveyor, describing the claim as lying partly in Section 2, T. 3 N. R. 17 E., and running the connection from corner No. 3 (southeast corner) of claim, to the quarter section corner between sections eleven and fourteen in said township and range, by a line from the former to the latter, south twenty-three degrees, twenty-five minutes and twenty-three seconds east 6232.8 ft. that the published and posted notices contained said description; that after publication had been made there being no adverse claim, said

entry was allowed; that subsequently—to wit: on March 7, 1885, the local land officers forwarded to your office, “a duly certified copy of amended field notes approved by the surveyor general, of a re-survey made by the same deputy surveyor February 16, 1885, setting forth the inaccuracy of the aforementioned connecting line, and giving the following as the true connection. ‘From Corner No. 3, section corner common to sections 2, 3, 10 and 11, T. 3 N., R. 17 E., bears north 57 degrees, forty-nine minutes and forty-two seconds west 3872.6 feet distant.’ Thus showing the claim to be in unsurveyed section 11, instead of Sec. 3, as originally described, published and posted.”

Your office held that although the proceedings in other respects were regular, yet the application, by reason of said error in the description, was fatally defective, and could not be cured by his amended survey; and therefore said entry must be held for cancellation.

The appellant insists that said ruling of your office is erroneous for the reason that the applicant for patent under the mining law (R. S. 2325) is required to file with his application a plat and field notes of the claim made by or under the direction of the United States surveyor general, showing accurately the boundary of the claim or claims, which shall be distinctly marked by monuments on the ground and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat, and also to file a certificate from the surveyor general that the plat is correct, with such further description by such references to natural objects, or permanent monuments as shall identify the claim; and furnish an accurate description to be incorporated in the patent; that the survey required by said section was made under the direction of the surveyor general by the deputy United States mineral surveyor, and, if any error has been committed in giving the course and distance of said connecting line, it was the fault of the officer of the government; that the applicant has shown good faith and the field notes, the plat, and the published notices all “refer to the four corner monuments of the survey No. 43, from points of intersection with the Buena Vista survey to the discovery monument, and also the course and distance of a tunnel upon said Buena Vista claim”; that the survey was made in accordance with the location notice and boundary stakes, and it embraces the identical land originally located.

With his argument on appeal counsel for the appellant has filed the affidavits of three persons, one of them being said deputy mineral surveyor, averring that the Buena Vista claim was among the first located and best known mines in the mining district; that its boundaries were recognized by all the adjacent claimants; that the error in the connecting line was on account of the mis-marking of the corner of the public survey by which said corner was identified; that upon ascertaining said error, said deputy surveyor was directed to correct said error by an amendment to the field notes which he accordingly did.

The decision of your office holds that said error is fatal and that the entry must, for that reason, be canceled. In this conclusion I cannot concur.

In the case of S. F. Mackie (5 L. D., 199) this Department said:

The purpose of the requirement of plats in certain cases is manifestly twofold,—namely: To inform the land Department as well as conflicting locators or protestants of all the natural facts concerning the claim which can be shown by plat and field notes. The Land Department must be advised that the claim, discovery, etc., are located on the public domain, and therefore must show all conflicting locations or claims, patented or unpatented.

In the case of the New York Lode and Millsite Claim (5 L. D., 513) this Department held that an entry made upon an application covering a lode claim and contiguous millsite, where the proof shows full compliance with the law, except in posting on the millsite portion of the claim, may be confirmed by the Board of Equitable Adjudication. In that case it was said: "The law has been substantially complied with. The informality appears to have arisen from an honest mistake, and there is no adverse claim."

In the case of the Newport Lode claim (6 L. D., 546) the Department held that a mineral entry may be submitted to the Board of Equitable Adjudication where the only defect in the proof is a misdescription of one of the lines of survey, occurring in the published notice of the application and such error was not the fault of the applicant, and does not prejudice the rights of third parties.

In the case at bar the entry has been allowed, the law has been substantially complied with, there is no adverse claim, and the error was the result of an erroneous marking of the corner of the public survey by the government.

I am of the opinion that said entry should be submitted to the Board of Equitable Adjudication for confirmation.

The decision of your office is modified, and you will accordingly submit said entry to the Board of Equitable Adjudication for confirmation.

SIOUX HALF BREED SCRIP—ACT OF JULY 17, 1854.

F. M. HEATON.

There is no authority in the Department to accept the relinquishment of scrip issued under the act of July 17, 1854, adjudge the ownership thereof, and issue new scrip of lesser denomination in its place.

Secretary Vilas to the Commissioner of Indian Affairs, April 30, 1888.

I return herewith the enclosure which accompanied your letter of the 26th instant upon the subject of the application of F. M. Heaton, of this city, for two pieces of scrip of forty acres each, to be issued in place

of one piece of Lake Pepin Sioux Half Breed scrip, No. 531, "C," for eighty acres issued under the act.

Upon reference to the act of July 17, 1854 (10 Stat., 304), it appears that the President was authorized to exchange with the half breeds or mixed bloods of the Dakota or other nations of Indians entitled to an interest in a certain tract of land on the west side of Lake Pepin, and for that purpose to cause to be issued to said persons according to such form as should be prescribed by the Commissioner of the General Land Office, certificates of scrip to the same amount of land to which each individual would be entitled in case of the division of the grant of land *pro rata* among the claimants, which certificates of scrip might be located upon any of the lands within the reservation, not then occupied by actual *bona fide* settlers of the half breeds or mixed bloods, or other persons who had gone into the territory under the authority of law, or other lands, and which certificates were not to embrace more than six hundred and forty, nor less than forty acres each. In execution of that act, the piece of scrip for eighty acres mentioned in your communication was issued under date of November 24, 1856. That was the end of the authority granted by that act. I find in it no authority to this Department, and I am aware of none existing in the law, to accept thirty years afterwards a relinquishment of the scrip and adjudge the ownership of it by descent or inheritance, and to issue new scrip in its stead. The case illustrates the difficulties which might ensue from assuming such an authority. It requires the Department to determine many various facts and consequences, which, in my opinion, the law does not commit to this Department to adjudge, but which belongs to the courts unless some other provision shall be made by Congress.

To assume such a jurisdiction will be to impose upon this Department much gratuitous labor and expose it to the risks of mistakes and injustice. I am unwilling to assume this responsibility in the absence of any legal duty to do so, even if I could find the authority. But I am also unable to concur in your recommendation upon the other ground, that the act referred to is *functus officio*, the only authority given by it having been executed.

RAILROAD GRANT—INDEMNITY—STATE RELINQUISHMENT.

ONTONAGON & BRULE RIVER R. R. CO. v. LE CLAIRE.

Lands within the primary limits of the Marquette and State Line Company, and subject to its grant at the date of the withdrawal and certification thereunder, though within the indemnity limits of the Ontonagon and State Line Company, were not subject to indemnity selection by said company; nor did the withdrawal of June 13, 1856, of said lands inure to the benefit of said company.

The release and relinquishment of such lands by the State, as lands within the grant to the Marquette and State Line Company, was an abrogation of the withdrawal of June 13, 1856, and restored said lands to the public domain.

Conceding the right of the company to select these lands, such right can not be asserted as against a prior application to enter under the homestead law.

Secretary Vilas to Commissioner Stockslager, April 27, 1888.

This case comes before the Department on the appeal of the railroad company from the decision of your office of April 19, 1883, allowing the application of Alexander LeClaire to make homestead entry of the NE. $\frac{1}{4}$, Sec. 35, T. 43 N., R. 34 W., Marquette, Michigan.

The tract in controversy is within the originally granted limits of the grant of June 3, 1856 (11 Stat., 21) to the State of Michigan, to aid in the construction of a railroad from Marquette to the Wisconsin State line, and also within the fifteen mile or indemnity limits of a line of road from Ontonagon to the Wisconsin State line, also provided for by said grant. June 13, 1856, all the public lands both odd and even sections, supposed to be within the limits of said contemplated roads, were withdrawn from market.

Subsequently, the State of Michigan conferred the grant for the line of road from Marquette upon a company designated as the Marquette & State Line Company, and for the line of road from Ontonagon upon a company designated as the Ontonagon & State Line Company. These companies were afterwards consolidated with the Chicago, St. Paul and Fond du Lac Railroad Company, and the last named company located the line of both roads.

The lines so located connected with the Chicago, St. Paul & Fond du Lac road at Brule River (the State line), and ran upon a common line from the river a few miles north where they diverged, the one running in a northerly direction to Ontonagon, and the other in a easterly direction to Marquette.

Subsequently, to wit, on June 2, 1859, a company known as the Chicago and Northwestern Railroad Company, purchased at a mortgage sale, made in pursuance of foreclosure proceedings had in the State of Wisconsin, the property and franchises of the Chicago, St. Paul & Fond du Lac R. R. Company.

On March 4, 1861, the legislature of Michigan declared the grant to the Marquette and State Line Company forfeited, and authorized and directed the Board of Control to confer the rights and privileges under said grant upon another company, and declared that the most practicable route for a railroad connecting Lake Superior with the system of railroads in Wisconsin should be located on a route from Marquette to the Menominee River, and the board was authorized to locate said line.

On December 12, 1861, the General Land Office certified to the State of Michigan three lists of clear lands; one for the Ontonagon and State Line; one for the Marquette and State Line, and a list of lands within the common limits of both roads where they intersected.

On April 16, 1862, the Board of Control, by virtue of authority conferred by the act of the legislature of March 4, 1861, conferred the grants, franchises and privileges of the Marquette and State Line Company upon a road known as the Peninsula Railroad Company, to aid

in the construction of a road from Marquette to the Wisconsin State line, at the mouth of the Menominee River as contemplated by said act, and passed a resolution requesting Congress to authorize the re-location of said line under the grants, rights and privileges conferred by the Act of June 3, 1856.

By joint resolution of July 5, 1862, Congress authorized the re-location of said line, and provided further:

That upon the filing in the General Land Office of the lists of said railroad lands, in whole or in part, as now selected and certified in the General Land Office, with the certificate of the governor of the State of Michigan, under the seal of the State, that said State and its assigns surrender all claim to the land, aforesaid, set forth and described in the lists thereof thus certified, and that the same have never been pledged or sold or in anywise encumbered, then the State of Michigan or its assigns shall be entitled to receive a like quantity of land, selected in like manner, upon the new line of road as thus surrendered upon the first line, and to the extent of six sections per mile in the aggregate for every mile of the new line, according to the general provisions of the act of June 3, 1856. And it shall be the duty of the Commissioner of the General Land Office to re-offer for public sale, in the usual manner, the lands embraced in the lists of surrendered lands aforesaid, when duly filed in his office, as herein directed.

In the mean time the Peninsula Company was consolidated with the Chicago and Northwestern Railroad Company, who located the new line of road, and on January 31, 1868, said last named company relinquished to the governor of Michigan all the odd sections along the originally located line of the Marquette and State Line Company, from Marquette to Brule River, including the lands in the common limits, and said lands were afterwards formally relinquished to the United States by the governor of Michigan.

The Commissioner of the General Land Office also required of the governor of Michigan a relinquishment of the lands from Ontonagon to the common limits, which was afterwards made by the governor, under the advice of the Attorney General of Michigan. Thereupon the General Land Office listed to the State of Michigan for the benefit of the Chicago and Northwestern Railroad Company a quantity of land along the line of the road as located by them, equal in amount to the lands released as aforesaid.

On May 29, 1873, the Acting Commissioner of the General Land Office ordered a restoration to market of all lands within the limits of the Ontonagon and State Line Company, and of the Marquette and State Line Company, embraced in said relinquishment, but on July 30, Commissioner Drummond suspended said order, and such was the status of said lands on September 17, 1880, when the Board of Control of the State of Michigan declared the franchises and grant of lands to the Ontonagon and State Line Company forfeited to the State, and conferred the same upon the Ontonagon & Brule River Railroad Company, a corporation organized under the laws of Michigan. It is under this

authority that the appellant claims the right to the lands in controversy, claiming that the governor of Michigan had no authority to release and relinquish to the United States the lands certified to the State for the benefit of the Ontonagon and State Line Company, said grant and franchises not having been forfeited at that time, nor until September 17, 1880, when its rights, grants and privileges were conferred upon the appellant company.

Without passing upon the questions as to the validity of said relinquishment, or of the rights of the appellant company under the grant of June 3, 1856, as the successor of the Ontonagon and State Line Company, it is sufficient for the purposes of this decision to hold that the lands in controversy were never within the granted limits of the Ontonagon and State Line Company, and are not subject to selection by the appellant company as against the rights of the applicants for the following reasons.

First.—Said lands are within the six mile limits of the grant to the Marquette and State Line Company, and although within the indemnity limits of the Ontonagon and State Line Company, said company had no right of selection of lands within the granted limits of the Marquette and State Line Company that were subject to said grant at the date of withdrawal, and of the certification of said lands to the Marquette and State Line Company. Hence, the withdrawal of June 13, 1856, did not inure to the benefit of the Ontonagon and State Line Company as to the lands in controversy.

Second.—The release and relinquishment of said lands by the State of Michigan to the United States, as lands within the granted limits of the Marquette and State Line Company, was a complete abrogation of the withdrawal of June 13, 1856, as to said lands, and by that act they were restored to the public domain as effectually as if said withdrawal had not been made, although there was no formal restoration to sale. No withdrawal of said lands has since been made and said company has no right that is paramount to the rights of others.

Third.—The company's right to indemnity can only vest upon actual selection and no selection having been made at the date of the pending applications, the right of the applicant is superior to the right of the company, even if the company has the right of selection under the grant of June 3, 1856.

For these reasons the decision of your office, allowing the application of Le Claire, is affirmed.

*HOMESTEAD—ACT OF MAY 14, 1880.***M. B. McNEAL.**

In the absence of an intervening claim, the rights of a homestead settler, under the act of May 14, 1880, relate back to the date of settlement, even though he does not make entry within the statutory period.

Secretary Vilas to Commissioner Stockslager, April 28, 1888.

The land involved herein is Lot 4, S. $\frac{1}{2}$ SE. $\frac{1}{4}$ Sec. 29, and NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 32, T. 62 N., R. 13 W., Duluth, Minnesota.

The claimant, McNeal, went on the land June 16, 1884, built a one-story log house, thirteen by fourteen feet, with shingle roof, split timber floor, door, window, etc., cleared about one and one-half acres, cultivated about one-quarter of an acre—total value \$500; and with the exception of three or four days in each month resided therein continuously until the last of January or the first of February, 1885. On July 2, 1884, he filed declaratory statement No. 3208, alleging settlement June 16, preceding as he supposed upon the land in question. This declaratory statement, however, described an entirely different tract. After discovering his error the claimant came to the local office December 15, 1884, relinquished his said pre-emption filing, and on the same day made homestead entry No. 2468, under the act of May 14, 1880 (21 Stat., 140) for the tract named. January 26, 1885, he made proof and payment in commutation of his said entry to the satisfaction of the local officers.

By letter "C" of April 17, 1885, your office suspended his cash entry and required him to furnish supplemental proof. The local office, on October 23, 1885, transmitted the claimant's corroborated affidavit made in Indiana County, Pennsylvania, August 27, 1885, from which it appears that from June, 1884, until his final proof on January 26, 1885, his residence on the land was continuous; that shortly after completing his entry, in consequence of the sickness of his father, who died February 15, following, he went to Pennsylvania where he has since remained. He also avers that his mother and her family required his presence; that he was under a physician's care from April 20 to June 15, 1885; and that he has not alienated the land in whole or in part.

Your office decision of November 18, 1885, found the claimant's proof unsatisfactory and held his cash entry for cancellation. From this action the claimant appeals.

The record, in my opinion, does not disclose sufficient warrant for the cancellation of this entry. The third section of the act of May, 1880, *supra*, provides that the rights of claimants under the homestead laws shall relate back to the date of actual settlement.

There being no intervening claim, I see no reason why his rights may not relate back to the time of his settlement, even though he did not file for the land within three months thereafter in strict accordance with the requirements of the act of May 14, 1880.

Your decision is reversed.

PRACTICE—SPECIFICATIONS OF ERROR.

CHASLIE *v.* SMITH.

The Department will not consider a question that is not in the record, except by appellant's own allegation and his objection made for the first time on appeal from the decision of the General Land Office, and which should have been made before the local officers and properly incorporated in the record.

Secretary Vilas to Commissioner Stockslager, May 5, 1888.

I have considered the case of Casper Chaslie *v.* Henry E. Smith, on appeal by the latter from your office decision of June 26, 1886, holding for cancellation his timber culture entry for the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, and the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 10, T. 18 S., R. 12 W., Larned, Kansas land district.

Smith made timber culture entry for said land December 5, 1883, and Chaslie executed affidavit of contest dated February 2, 1885, alleging failure to break or cause to be broken five acres or any part of said land up to that time. Notice of the filing of said affidavit was issued February 13, 1885, fixing the hearing thereunder for April 20, 1885, personal service of which notice was had March 5, 1885. On April 20th the hearing was, by agreement, continued until May 20, 1885. On May 20th the parties appeared in person and by attorney, when the defendant filed a motion for continuance for the period of sixty days, and the plaintiff filed his motion to be allowed to take the testimony of his witnesses at once they being then present at great expense to him.

May 21, 1885, claimant filed his affidavit stating that on April 18, 1885, he had been shown a letter from the register to the attorney for contestant, stating that said cause could not be heard at the time originally set and "affiant's recollection is that said letter stated the case could not be heard in the regular order after ten days from that time before July or August 1885, and for a temporary continuance only affiant agreed with plaintiff's attorney for a continuance till May 20, 1885, at which time affiant supposed and believed another continuance would be granted to suit the convenience of the land office and the litigants to said action till July or August"; that he did not anticipate a hearing at this time in whole or in part, and was taken by surprise, that he could not procure the attendance of his witnesses at that time nor in thirty days; that by reason of said surprise he was not prepared to pay the expense of cross examining any of plaintiff's witnesses and asked that the hearing be continued for sixty days when he could produce the witnesses in his own behalf and be prepared to pay the expenses of cross examination of plaintiff's witnesses.

The local officers allowed the plaintiff's motion to take the testimony of his witnesses, which was accordingly done on May 22, 1885, no cross examination being made and the case was then continued for thirty days.

On June 23, 1885, C. A. Morris, attorney for defendant, filed his affidavit stating "the said defendant is unavoidably prevented from being present at this time to defend said cause," and that certain witnesses, naming them, were not present "that due diligence has been used to procure their attendance" and asking further continuance for thirty days. This motion was refused and no further testimony being offered the local officers decided in favor of contestant. On appeal by contestee to your office, said decision was sustained and the entry held for cancellation.

The record shows no error in the rulings of the local officers refusing a further continuance of the case upon the affidavits filed in support of the motion therefor.

The defendant did not in any of the affidavits filed show what efforts he had made to procure the attendance of his witnesses nor did he set up what facts those witnesses, or any of them would testify to except in general terms that they would testify that he had "complied with all the requirements of law," nor does he state that even this general statement is true. In the face of the utter lack of these recognized requisites of an affidavit for continuance, the claimant was by the local officers allowed two different delays of thirty days each. He certainly can not complain of their action in this regard. The affidavit made by claimant's attorney June 23, 1886, setting up the unavoidable absence of the claimant and of witnesses does not state the facts with the particularity required in such affidavits, and therefore it was not error on the part of the local officers to refuse to grant a further continuance.

The other error assigned is in the denial of "the right of cross examination by the register unless he paid for the same which he was utterly unable to do." The record does not show that he asked to be allowed to cross examine the contestant's witnesses or that such application if made was refused on the grounds alleged.

It was not urged before your office that such application was made and refused. The records indicate that the claimant supposed he was required to pay for the cross examination of the contestant's witnesses and resting upon this supposition made no effort to assert his right to cross examine those witnesses.

This Department will not consider a question that is not in the record, except by appellant's own allegation and his objection made for the first time on appeal from the decision of your office and which should have been made before the local officers and properly incorporated as a part of the record of the case.

The testimony submitted by the contestant is clear and conclusive to the effect that claimant had not prior to the date when notice of contest was served on him, plowed any part of the land. The allegations of the contest affidavit are sustained, and the entry will be canceled. Your said office decision holding said entry for cancellation is affirmed.

REPAYMENT—TIMBER CULTURE ENTRY.

WILLIAM S. FENNO.

On the cancellation of a timber culture entry for the reason that the land was not "devoid of timber," repayment may be allowed if the entry was made in good faith.

Secretary Vilas to Commissioner Stockslager, May 5, 1888.

I have considered the appeal of William S. Fenno from your office decision of July 24, 1886, refusing his application for repayment of fees and commissions paid on timber culture entry, for the SE. $\frac{1}{4}$ of Sec. 22, T. 140 N., R. 93 W., Bismarck land district, Dakota.

Your office letter to the register and receiver says:

You are advised that said entry was canceled upon relinquishment April 6, 1886. The law governing the return of fee and commissions does not provide for repayment in cases where parties voluntarily relinquish or abandon their entries. Therefore, the application is denied.

The statement that said entry "was canceled upon relinquishment" is clearly a mistake. The records of your office show that Fenno made his entry July 30, 1883, and on November 27, of that year contest was initiated charging that said section was not devoid of timber. The local officers decided in favor of claimant and on appeal your office, on January 10, 1885, reversed their decision, because it was shown by a preponderance of the testimony that the land was not devoid of timber. Your said office decision was, on appeal by claimant affirmed by this Department March 24, 1886, and the entry formally canceled on the records of your office April 6, 1886, in accordance with said departmental decision.

None of said decisions charge that the entry was allowed by reason of fraud on the entryman's part, but the facts seem to indicate that it was made in good faith though through a mistaken conception of the meaning of the words "devoid of timber" as used in the statutes and construed by this department. That the condition of the land was such as to justify the conclusion that the entry was made in good faith and in the belief that the tract was subject to entry under the timber culture law is shown by the fact that the local officers after considering the testimony adduced at the hearing so determined. This being true, the claimant is brought within the provisions of the statute and his application for repayment of fees and commissions paid on said entry should be allowed.

Your said office decision denying his application is reversed.

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PUEBLO OF MONTEREY.

Motion for review of the departmental decision rendered in this case October 4, 1887 (6 L. D., 179), overruled by Acting Secretary Muldrow, May 5, 1888.

*RAILROAD GRANT—MILITARY RESERVATION—FORT SEWARD.***NORTHERN PAC. R. R. CO. v. MARTIN.**

An order of a commanding general, reserving lands for the purpose of a military reservation, subsequently approved by the President, takes effect by relation from the date of such order.

The legislative withdrawal following the designation of the general route of the Northern Pacific was only from sale, entry and pre-emption, and did not debar, within its limits, the executive from the exercise of its ordinary authority in the matter of establishing military reservations.

The act of June 10, 1880, abolishing Fort Seward military reservation was a legislative recognition of the validity of such reservation as an exception from the grant to the Northern Pacific, and the law to govern the disposition of the lands embraced within it.

Secretary Vilas to Commissioner Stockslager, May 5, 1888.

On March 14, 1881, Zalmon S. Martin filed declaratory statement for Lots 5 and 6, Sec. 23, Lot 2, Sec. 24, Lot 3 Sec. 25, and Lot 15, Sec. 26, T. 140 N., R. 64 W., Fargo Dakota, alleging settlement February 28, preceding. October 25, 1881 he made final proof and applied to enter the land. The local officers without allowing the entry stated that the tracts were formerly embraced in the Fort Seward military reservation, that the Northern Pacific claimed the land, and transmitted the papers to your office for instructions.

By letter of June 4, 1886 your office rejected the claim of the company, and directed that Martin be allowed to enter the land on the proof made.

The tracts lie within the limits of the withdrawal for the Northern Pacific railroad on map of general route filed February 21, 1872, and within the granted limits of said road as defined on map of definite location filed May 26, 1873.

It appears that on June 18, 1872, Major General Hancock, commanding the Department of Dakota, issued a general order as follows:

Subject to the approval of the proper authorities the following described lands situated near the Northern Pacific railroad crossing of James river, Dakota Territory, are hereby reserved to the United States as a reservation for a military post to be built thereupon.

A description of the land follows and embraces the land here in controversy. The reservation was about one mile square, lying mostly in an adjoining even numbered section, and entirely within the railroad limits above described. Said order was afterwards formally approved by the Secretary of War and on November 23, 1873, by the President. The reservation was named Fort Seward.

The questions arising in this case are, first, did the commanding general have power to make a military reservation, and, secondly, was there any authority in the Executive to so reserve lands within the limits of the withdrawal for said company on general route, after the map of general route had been filed.

As to the first question, I assume that the general power of the President to make such reservations of public lands for military purposes as the necessities of the government require, unless specially circumscribed by statute, will not be questioned. In the case of *Wilcox v. Jackson* (13 Peters 498) the supreme court held that the President speaks and acts through the heads of the several departments in relation to subjects which pertain to their respective duties. Both military posts and Indian affairs belong to the War Department. A reservation of lands, made at the request of the Secretary of War, for the purposes in his department must be considered as made by the President of the United States; and the court felt justified in presuming that the act of the Secretary of War was done by the approbation and direction of the President. Applying this reasoning to the case here, I must hold that the approval by the President of the order of the commanding general, by relation created a military reservation from the date of such order.

The second question leads to an examination of the act granting lands to said company. (13 Stat., 365.) The sixth section of said act provides:

"That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed except by said company, as provided by this act."

This section was under consideration in the case of *Buttz v. Northern Pacific Railroad*, (119 U. S., 55) and the court held that when the general route of the road was fixed by the filing of a map thereof, the *law* withdrew from sale or pre-emption the odd sections to the extent of forty miles on each side. The question now arises whether this legislative withdrawal operated to prevent the Executive from creating a military reservation within the limits of the withdrawal. Certainly such is not the effect of the withdrawal *in terms*, for the statute only withdraws the land from "sale, entry, or pre-emption". A similar question arose in the construction of the grant for the *Kansas Pacific Railway Company*. The original grant for that road, under the act of July 1, 1862 (12 Stat., 489), required the Secretary, upon the filing of the map of general route, to withdraw the lands within fifteen miles of the route from "*pre-emption, private entry and sale*". The company failed to designate its general route, during the period fixed by that act, and the act of July 3, 1866 was then passed extending the time for filing such map to December 1, of that year, and providing that "the lands along the entire line thereof, so far as the same may be designated, shall be reserved from *sale* by order of the Secretary of the Interior". Under this latter act the map of general route was filed. On consideration of these statutes the court in the case of *Kansas Pacific Ry. Co.*

v. Dunmeyer (113 U. S., 629), held that the withdrawal under the act of 1866 was "from sale only and not from pre-emption and homestead claims." In discussing the use in the statute of the words "pre-emption, private entry and sale," the court said:

In the terminology of the laws covering the disposition of the public lands of the United States, each of these words has a distinct and well known meaning in regard to the mode of acquiring rights in these lands. This is plainly to be seen in the statutes we are construing. In the third section, or granting clause, there are excepted from the grant all lands which at the time the definite location of the road is fixed had been *sold, reserved*, or otherwise disposed of, and to which a *pre-emption* or *homestead* claim had attached. Here sale, pre-emption, and homestead claims are mentioned as three different modes of acquiring an interest in public lands, which is to be respected when the road becomes located, and the words are clearly used because they were thought to be necessary. But a sale for money in hand, by an entry made by the party buying is throughout the whole body of laws for disposing of the public lands, understood to mean a different thing from the establishment of a pre-emption or homestead right when the party sets up a claim to a definite piece of land, and is bound to build on it, make fences, cultivate and reside on it for a period of time prescribed by law.

Adopting this line of argument, I am of opinion that it is not necessary to go beyond the plain letter of the statute now under consideration to find its true intent and spirit. The lands along the line of the Northern Pacific railroad, upon the designation of the general route, were, therefore, withdrawn only from sale, entry, and pre-emption. In other words private individuals were cut off from acquiring rights to the lands from that date, by the methods enumerated. But to hold that the Executive was debarred by this provision of the statute from its ordinary jurisdiction of selecting such sites for military posts as the necessities of the times demanded, would be to import a provision into the statute, not found in the context, and clearly not within the contemplation of the Congress. I conclude therefore, that the reservation in question was made with full authority of law.

The reservation remained until 1880, seven years after definite location, and, therefore, served to except the land embraced in it from the operation of the grant.

By act of Congress of June 10, 1880, (21 Stat., 172) said reservation was abolished, and the Secretary of the Interior was authorized to have the lands embraced therein surveyed and made subject to homestead and pre-emption entry and sale, "the same as other public lands." This is both legislative recognition of the validity of the reservation as an exception upon the grant and the law to govern the disposition of the lands embraced within it. The lands have been surveyed. Your said letter proposes to fix the price of these lands at the double minimum, \$2.50 per acre, under section 2364, U. S. Revised Statutes, for the reason that the lands in the even numbered sections have been raised to that price by law. That course meets my approval.

For the reasons herein given the decision appealed from is affirmed.

J. R. GLOVER.

Motion for review of departmental decision rendered in this case July 22, 1886 (5 L. D., 17), overruled by Secretary Vilas, May 5, 1888.

PRACTICE—BURDEN OF PROOF—COSTS.

NEFF *v.* COWHICK.

In order to secure a forfeiture of improvements upon a claim the contestant must show, by a clear preponderance of evidence, that the entryman has failed to comply with the law.

The finding of the local office, with the witnesses before them, is entitled to special consideration in matters of fact.

Under Rule 57 of Practice (Rules of 1880), the contestee is not required to pay the expense of cross-examining the contestant's witnesses.

Secretary Vilas to Commissioner Stockslager, May 11, 1888.

I have considered the appeal of John V. Cowhick, from your office decision of February 3, 1886, holding for cancellation his homestead entry on the NW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$, and lots 1 and 3, Sec. 24, T. 14 N., R. 67 W., Cheyenne land district, Wyoming; and also the appeal of the contestant Eugene Neff from so much of your said decision as holds that the contestee should not pay the cost of cross-examining the contestant's witnesses.

The testimony is well briefed in your decision, which is hereto appended, except that you fail to state that the contestant testifies that he saw in the shanty a bedstead, table, piece of carpet, and broom, and that from other testimony it appears that there was a wire fence, with gate, around the whole tract.

The charge is abandonment; and although, at the hearing only the testimony of the witnesses for the contestant was taken, the local officers decided in favor of the contestee and recommended the dismissal of the contest. I am willing to give the contestee the benefit of the doubt. In order to secure a forfeiture of improvements upon a claim the contestant must show, by a clear preponderance of evidence, that the contestee has failed to comply with the requirements of the law. The burden of proof is upon the contestant. *Tibergheim v. Spellner* (6 L. D., 483). The evidence in this case was entirely *ex parte*, but is chiefly of a negative character. In the case of *Morfey v. Barrows* (4 L. D., 135) it was held:

The local officers, before whom the witnesses personally appear, have the advantage over all appellate tribunals, from their opportunity to observe the appearance and bearing of the witnesses, their manner in giving their testimony, etc.; for which reason the Department looks with great respect upon the conclusion of the local office as to matters of fact.

In this case these reasons apply with unusual force because the land involved is not over two miles from the land office, and the parties to the contest and the witnesses reside in Cheyenne or its immediate vicinity, so that their reputation for veracity and their opportunities for knowing the facts involved in the contest are more apt to be known than if the land were at a distance.

The local office found that the charge of abandonment had not been proven. I likewise cannot find that abandonment has been proven.

Your decision, holding the contrary is, therefore, reversed.

I concur in your decision that the contestee is entitled to have returned to him the sum (\$28.12) improperly charged to him as the expense of cross examining the contestant's witnesses.

Rule 57 of Practice* in force at the time this contest was made is as follows: "Persons contesting the validity of homestead and timber culture entries must pay the costs thereof."

Your decision sustaining the contest is reversed, and your decision requiring re-payment of charges improperly made is affirmed. This decision renders it unnecessary to pass upon the motion for a re-hearing.

RAILROAD INDEMNITY—ACT OF JUNE 22, 1874.

HASTINGS & DAKOTA RY. CO.

An application to select indemnity under the act of June 22, 1874, cannot be entertained, until a relinquishment of the land, forming the basis for such indemnity, is filed.

Secretary Vilas to Commissioner Stockslager, May 11, 1888.

By your office letter of May 22, 1886, you affirm the action of the local officers at Benson, Minnesota, in rejecting the selections by the Hastings & Dakota Railway Company under the act of June 22, 1874, (18 Stat., 194) of the NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 6 T. 120, R. 44, and other tracts therein mentioned.

The local officers rejected the applications for the reason that it did not appear that the company had relinquished its claims to the lands in odd sections for which indemnity was sought.

Said act provides:

That in the adjustment of all railroad grants, whether made directly to any railroad company or to any State for railroad purposes, if any of the lands granted be found in the possession of an actual settler whose entry or filing has been allowed under the pre-emption or homestead laws of the United States subsequent to the time at which, by the decision the land-office, the right of said road was declared to have attached to such lands, the grantees, upon a proper relinquishment of the lands so entered or filed for, shall be entitled to select an equal quantity of other lands in lieu thereof from any of the public lands not

* Rules of Practice adopted December 20, 1880, 2 C. L. L., 198.

mineral and within the limits of the grant not otherwise appropriated at the date of selection, to which they shall receive title the same as though originally granted.

Under this act the filing of "a proper relinquishment" is the basis of the right to select lands in lieu of those relinquished. I therefore concur with your office in the ruling, that applications to select indemnity lands under said act cannot be entertained until relinquishments of the lands forming the basis for such indemnity, are filed.

DESERT LAND—MESQUITE TREES.

The presence of a growth of mesquite trees on land will not exclude it from desert entry, if it appears that such land will not, without irrigation, produce an agricultural crop.

Secretary Vilas to Commissioner Stockslager, May 11, 1888.

On the 29th of August, 1887, this Department referred to your office for report a letter from the Governor of Arizona, enclosing a petition signed by numerous citizens of that Territory, asking that there be some modifications in the regulations relating to the entry of land under the desert land law of March 3, 1877 (19 Stat., 377).

It is asserted in said petition that your office was holding every desert land entry in that Territory for cancellation upon which there were more than four mesquite trees per acre, and that such ruling was manifestly unjust, illiberal and not in harmony with the object and purpose of the desert land law.

Your office reported, under date of September 24, 1887, that it was, and had been, the practice to hold desert land entries for cancellation upon which there is a growth of mesquite trees; that your information is to the effect that "in Arizona mesquite trees grow to a height of thirty feet and three feet in girth"; that "it is held that lands containing sufficient moisture to produce a natural growth of trees are not to be classed as desert lands; and that in accordance with such ruling seven (naming them) desert land entries in said Territory had been held for cancellation, from which orders of cancellation there had been no appeal in any case." Your office further stated that no specific instructions had been given your special agents regarding the character of lands covered with a growth of trees, except in office circular of June 27, 1887 (5 L. D., 108).

Section two of the desert land act provides:

That all lands exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crop, shall be deemed desert land within the meaning of this act, etc.

Section three provides that—

The determination of what may be considered desert lands shall be subject to the decision and regulations of the Commissioner of the General Land Office.

In carrying out the design of the law the circular of June 27, 1887, provides: "Lands containing sufficient moisture to produce a natural growth of trees are not to be classed as desert lands."

It is alleged, in the petition referred to above, that:

Mesquite is not *timber* in any just interpretation of the term; that it is merely firewood, and useful and salable only for that purpose, although it may be possible to make small articles out of the wood (as curiosities), but nothing of practical use or value, owing to its brittleness or lack of fibre and size; that mesquite will not produce a log of more than two or three feet in length, for at that height the gnarled and stunted trunk spreads into dwarfed and scraggy branches, and is usually decayed in both trunk and branch; that mesquite trees grow upon land which will not, without artificial irrigation, produce a spear of grass, or any other vegetation, except grease-brush, sage-brush, palo verde—another scrub tree—and cactus, and is a clear proof of the desert character of the land, rather than an argument against such character; that mesquite trees grow upon high sandy knolls, which will not even produce grease brush or sage-brush, and which would be valueless even if water was carried thereon artificially; that large bodies of land in this Territory, bearing mesquite trees in much larger numbers than four to the acre, are, by the entire absence of a natural water supply, and the absolute impossibility of raising any crop thereon without artificial irrigation, desert land, that to withdraw land of this character from entry under the desert land act will cause great loss to *bona fide* settlers, and will seriously check immigration, the forming of new holdings and the employment of capital in clearing, ditching and reclamation of such land—and without irrigation they are practically worthless; that the current price of mesquite wood will give little or no margin of profit over the expense of cutting and hauling to market, consequently it offers no temptation whatever to the mere speculator in wood, and is not done except as the first necessary step toward the reclamation of the land; that already two millions of dollars have been expended in constructing ditches, clearing and reclaiming land in the Salt-river valley alone, and it will require as much more capital to thoroughly reclaim the land in this and adjacent valleys, from its desert condition—a large amount of the land thus reclaimed does in its natural state produce mesquite, and . . . that not one acre of it all will produce an agricultural crop without irrigation; and that this matter is of vital importance to the present settlers within this Territory, who are spending their money, employing their energy in the reclamation of this land, and their influence in inducing new comers to locate.

In the American Cyclopaedia, Vol. II, p. 487, is an article on the mesquite tree. It is there said:

The mesquite seldom grows more than thirty or forty feet high, and when well developed, has a rounded head; but owing to the injuries caused by insects and the parasitic mistletoe, the trunk and branches are frequently irregular and distorted. In its foliage it greatly resembled the honey locust. . . . The tree has a wide range, being found as far north as the Canadian river and extending far south into Mexico; it makes its appearance a short distance from the coast in western Texas, and is the most abundant tree as far westward as the Colorado and the gulf of California; it is exceedingly variable, sometimes appearing as a large shrub forming dense thickets, which from

the abundance of spines are impassable, and at other times growing singly with well developed heads, and when viewed from a distance appearing like an apple orchard so uniform are the trees in size. Were it not for the mesquite, large tracts in Arizona and northern Mexico would present still greater difficulties to the traveler than they do, as this tree there affords the sole supply of fuel and forage. The wood is very hard, fine-grained, dark reddish brown in the heart wood, and is sometimes used by the Mexicans for furniture, but it is difficult to get pieces large enough to be valuable for lumber; its durability is probably not inferior to that of the locust. As fuel the mesquite has no superior; it makes a hard sonorous coal, a fire of which is almost as intense as one of anthracite; travelers across the *desert country* where it abounds rely upon it for fuel, the roots being found almost everywhere; where frequent fires destroy the trees the roots remain untouched, throw up a yearly growth of small stems, and thus continue to increase in size, while the growth above ground is destroyed every year or two, etc.

In the report of the Commissioner of Agriculture for 1870, page 410, this tree is spoken of as "The common tree of the deserts." And in the same report for 1872, page 452, it is said: "It (the mesquite) grows where no other fruit tree would live."

The views of the present Commissioner of Agriculture upon the subject were, upon request, furnished this Department by letter, dated October 9, 1887. That officer says:

For the region referred to (Arizona) the mesquite fulfills the function of a forest tree Not only does the mesquite form the only wood material in the region, inferior though it be except for fuel, but its existence even in the dwarfed growth—which is partly due to climatic conditions, partly to browsing animals, and (un)avoidable fires—is of great future value, etc.

From the foregoing, I think it clearly apparent that mesquite trees will grow upon land which will not, without irrigation, produce an agricultural crop. It does not follow, however, that land will not produce an agricultural crop simply because mesquite trees are found growing thereon.

The object of the desert land law is to reduce to an agricultural state lands which will not without irrigation produce an agricultural crop. I think it can be fairly gathered also from the act and the reasons which brought about its passage that the phrase "timber lands" as used therein did not have reference to land upon which there were but few mesquite trees.

It was well known at the time when the desert land law was enacted by Congress (and it must have been known to that body) that in the region of country to which its application extended there were extensive areas of land which in the main possessed the characteristics of desert land in that they were hilly and rocky, but which were covered with a growth of valuable timber. Such lands would not produce an agricultural crop after the timber had been cut from them without first being irrigated, and in many instances even irrigation would not make them productive. They were valuable chiefly for their timber.

It was to such lands that the exception in the second section of the desert land act applied, and not necessarily to lands upon which mesquite trees were growing. If lands are not hilly and rocky and are covered with timber, they cannot be entered under the desert land act. They must be entered either under the timber land act, or under the settlement laws. If the lands are not hilly and rocky and have but few ordinary timber trees upon them, they are not subject to entry under the desert land act, because the existence of such trees is evidence of the fact that the land is not desert. If the ordinary forest trees will grow upon land, there is sufficient moisture in the soil to render the land non-desert in character. But as before shown the fact that mesquite trees grow upon land is not evidence of the non-desert character of the soil.

From all which I am clearly of opinion and therefore advise you that where it is clearly shown that the land without irrigation will not produce an agricultural crop, it is subject to entry under the desert land act, even if such land has some or even a considerable growth of mesquite trees upon it. The mesquite is, sometimes at least, a desert tree, as sage brush is a desert shrub; and the character of the land must be determined by the other rule laid down by the statute. Nor can the mesquite be regarded as timber, and thus effect the question.

I do not find anything in the circular of instructions to the contrary of this rule. But it may be well to give some expression to it in the new edition about to be prepared, and you will conform to it in the determination of cases hereafter.

DESERT LAND ENTRY—REPAYMENT.

GEORGE H. GOBLE.

Repayment may be allowed where a tract forming a part of a desert entry is relinquished because not susceptible of irrigation, it appearing that the entry was made in good faith and prior to survey.

Secretary Vilas to Commissioner Stockslager, May 11, 1888.

I have considered the appeal of George H. Goble from your decision of September 24, 1886, rejecting his application for re-payment for the SE. $\frac{1}{4}$ of Sec. 26, T. 22 N., R. 120 W., Evanston land district, Wyoming Territory, being a portion of his desert land entry No. 15.

Claimant alleges that his "entry was made under a preliminary survey," that the "surveys when completed changed the boundaries of said entry upon the mountain; that he has reclaimed four hundred and eighty acres." He asked permission to relinquish the SE. $\frac{1}{4}$ of Sec. 26, upon the ground that the tract is incapable of irrigation.

July 8, 1886, you instructed the register and receiver as follows:

In final proof No. 6 by George H. Goble, made June 25, 1881, for six hundred and forty acres, of desert land, the claimant proposes that as

he cannot irrigate the SE. $\frac{1}{4}$ of Sec. 26, of his claim, he will relinquish the same one hundred and sixty acres to the government. You will call upon him to make such relinquishment in due form, which when thus made, you will transmit to this office.

Thereupon claimant executed his relinquishment to the said SE. $\frac{1}{4}$ August 9, 1886, and at same date made application in due form for repayment. Your office thereupon canceled the entry as to said SE. $\frac{1}{4}$ September 16, 1886, and in your letter to the register and receiver of that date you say: "The question of the purchase money will be the subject of another letter." On September 24, 1886, you informed the register and receiver by letter "M" as follows:

Referring to your letter of 10th ultimo, relative to the return of the purchase money paid by George H. Goble for the SE. $\frac{1}{4}$ of Sec. 26, T. 22 N., R. 120 W., said tract being a portion of desert land entry No. 15, final certificate No. 6, you are advised that the claimant relinquished the above described tract for the reason that he could not reclaim the same, therefore, it was canceled September 16, 1886. The law governing the return of purchase money does not provide for re-payment in cases where parties fail to comply with the law, under which they have made their entries, therefore the application is denied.

From this action claimant appeals.

In the case of Hiram H. Stone (5 L. D., 527) the Department after referring to the act of June 16, 1880 (21 Stat., 287) says:

It seems a consistent construction of that statute to hold that it contemplates repayment in cases where the entry is made in good faith, and cannot be confirmed in its entirety. In this view applicant is entitled to repayment of the money paid on said entry.

It appears in this case that the entry was made in good faith and that when the survey was completed it included in the entry land other than that which the entryman supposed he had entered; that a portion of the land so included was not susceptible of irrigation, and was therefore erroneously allowed. I am of the opinion that the case is within the provisions of section two of the act of June 16, 1880 (21 Stat., 287), as construed by the Department in the case above cited.

You will therefore make the repayment of the excess of fees and purchase money over and above the price and fees paid for the four hundred and eighty acres.

Your decision is reversed.

RAILROAD GRANT—INDEMNITY SELECTION.

NORTHERN PAC. R. R. CO. v. MYRSTROM.

An application to enter land under the homestead law, pending on appeal, excludes the land covered thereby from indemnity selection.

Secretary Vilas to Commissioner Stockslager, May 11, 1888.

I have considered the case of the Northern Pacific Railroad Company v. C. A. Myrstrom on appeal by the company from your office de-

cision dated July 13, 1886, rejecting its claim to the NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, and E. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 11, T. 133 N., R. 43 W., Fergus Falls, Minnesota.

It appears from the record that the land is within the granted limits of the road now known as the St. Paul, Minneapolis & Manitoba Railway—St. Vincent Extension—the rights of which attached on definite location December 19, 1871, and within the indemnity limits of the Northern Pacific Railroad, the withdrawal for which became effective January 6, 1872.

On April 21, 1871, one Hans Hoops made homestead entry for the tract, which stood intact upon the records until October 26, 1878, when it was canceled. This entry served to except the tract from the operation of the grant for said St. Vincent Extension upon definite location, and from the operation of the withdrawal in the indemnity limits of the Northern Pacific road.

On May 3, 1879, Martin Olson applied to enter the land under the homestead law. His application was rejected by the local officers on account of the supposed conflict with the grant for said St. Vincent Extension, and he appealed.

December 29, 1883, the Northern Pacific Company applied to select said tract and its application was rejected because of the pending application of Olson. The company appealed.

On February 15, 1886 a relinquishment and waiver of the claim of Olson was filed in the local office, and Myrstrom was allowed to make homestead entry of the tract.

Your office by said letter of July 13, 1886, rejected the company's selection on the ground that one company cannot go into the granted limits of another to seek indemnity and "because Olson's claim for the land was pending before this (your) office when the company's application was presented, and was a bar to the selection of the land for railroad purposes".

The right of the Northern Pacific company to the land, under its selection must be determined as of the date of the selection. At that date the appeal of Olson from the rejection of his entry was pending in your office. The rejection of his entry on account of the claim of the grant for said St. Vincent Extension company was erroneous, for the reason, as above shown, that the land was excepted from the operation of that grant by the entry of Hoops. The claim of Olson therefore, at the date of the selection, was a valid one. It is the established ruling of this Department that "selections while lands are thus *sub judice* are invalid and are not to be regarded as conferring any rights." *Olson v. Larson et al.* (4 L. D., 408). The claim of the company is therefore rejected on that ground. This renders it unnecessary to pass on the other ground relied on by your office, that one company cannot go into the granted limits of another to seek indemnity and no ruling on that proposition is herein made.

For the reasons herein stated the decision appealed from is affirmed.

RESIDENCE—PUBLIC OFFICIAL.

A. E. FLINT.

When a *bona fide* settler has established a residence, and is afterwards called away by official duty which requires his presence at the county seat, such absence will not work a forfeiture of his rights.

Secretary Vilas to Commissioner Stockslager, May 11, 1888.

It appears from the record in this case that on May 12, 1879, Alphonso E. Flint filed his pre-emption declaratory statement for the NE. $\frac{1}{4}$ of Sec. 28, T. 155 N., R. 47 W., Crookston land district, Minnesota, and that on February 7, 1882, he transmuted the same to homestead entry No. 6526. That on December 11, 1885, he made his final homestead proof, which was duly approved by the local officers, and final certificate No. 2878 was issued to him thereunder. That by letter "C" of your office, under date of July 9, 1886, you suspended said final certificate, "for the reason that the claimant has not complied with the requirements of the homestead law as to five years continuous residence from the date of settlement." From this decision claimant appealed.

From the final proof of claimant it appears that he established his residence on the land on May 11, 1879, and that he, with his family, consisting of his wife, resided continuously thereon until November, 1879, when he was elected to the office of county attorney, for Marshall county, Minnesota, the same county in which his homestead is situated; that he thereupon removed to Warren, the county seat of said county, to attend to the duties of said office, and remained there for that purpose, until February 1, 1883, when he resigned his said office and returned to his said homestead and resided continuously thereon until November, 1883, when he was elected to the office of probate judge for said county of Marshall; whereupon he again removed to the county seat of said county to attend to the duties of his said latter mentioned office, which he was still holding at the date of making final proof; that claimant's improvements on the land consist of a frame dwelling house, twelve by sixteen feet in size, and forty-five acres of breaking, valued at \$300. That he has had the forty-five acres of breaking under cultivation for five years, and has raised crops thereon every season; and he swears "that it is his *bona fide* intention to return to his said homestead at the expiration of the term of his said office."

It would seem from the foregoing, that claimant continued the improvement and cultivation of said land, from the date of settlement until the time of making final proof, notwithstanding his absences as stated; and there appears to be nothing in the record to impeach his good faith in the premises.

The only question to be determined therefore is as to whether the said absences of claimant in discharge of the duties of the public offices to

which he was respectively elected, as aforesaid, wrought a discontinuance of his residence on the land after it had been established as shown by his final proof.

It was held by this Department in the case of *Benson v. Western Pac. R. R. Co.* (1 C. L. O., 37), that "a public officer may, during the term of his office, actually reside at the capitol, or other place required by law for him to reside, without losing his legal residence."

The rule laid down in this case was cited in *Harris v. Redcliffe* (2 L. D., 147), and therein explained and acted upon as meaning "that when a *bona fide* settler had established a residence on the land, and was afterwards called away by official duty which required his presence at the county seat, such absence would not work forfeiture of his rights."

Applying the rulings of the department in the cases cited, to the facts of this case, I think that claimant's said final certificate should be sustained and that patent should issue to him for the land therein embraced.

The decision of your office is accordingly reversed.

TIMBER CULTURE CONTEST—PRACTICE—NOTICE—BREAKING.

ALLEN v. LEET.

An affidavit that sets forth conclusions, and not facts, is fatally defective as a basis for notice by publication.

The affidavit required is a condition precedent to notice by publication, and if defective the notice is unauthorized and illegal, and no subsequent affidavit can cure the defect.

In personal service the delivery of a "copy" only is required and it is not material whether such copy be written or printed, or partly written and partly printed.

The provision of Rule 15 that the affidavit therein required shall state the "place" of service, is not material in cases where the fact of service is admitted or undisputed.

Proof of "plowing" is an answer to the charge of failure to "break."

Any "breaking" of the required amount of land the first year sufficient to put it in condition for cultivation "to crop or otherwise" the second year, is a substantial compliance with the statute, whether such breaking be done by plow or harrow.

Secretary Vilas to Commissioner Stockslager, May 11, 1888.

I have considered the case of *Robert J. Allen v. Dexter Leet*, involving timber culture entry, No. 5706, of said Leet, upon the SE. $\frac{1}{4}$ of Sec. 4, T. 9 N., R. 19 W., Grand Island district, Nebraska, on appeal from the decision of your office of April 23, 1886, remanding said case for a rehearing.

Leet made timber culture entry on said land April 24, 1884, and Allen filed affidavit of contest, April 27, 1885, and R. B. Pierce, county judge of Dawson county, Nebraska, was duly appointed to take testimony. June 3, 1885, being set as the time for taking the testimony and June 8, 1885, for the final hearing.

The contestant, Allen, having made and filed an affidavit, "that he has made due and diligent search for Dexter Leet and that he cannot be found nor heard of, and that personal service of notice of this contest can not be made on said defendant in the State of Nebraska," notice by publication was made.

Rule of Practice 11, requires that in the affidavit for notice by publication, "the party will be required to state what effort has been made to get personal service."

The above affidavit states conclusions and not facts, and hence is fatally defective as a basis for notice by publication.

While the testimony was being taken by said Pierce, and after the contestee had filed a motion to dismiss the contest on the ground of defective or improper service, Allen filed a supplemental affidavit, setting forth the facts as to the efforts which had been made by him to get personal service. The affidavit required by the rule is a condition precedent to notice by publication, and if the proper affidavit be not made before the publication, the notice is unauthorized and illegal and no subsequent affidavit can cure the defect.

If this attempted notice by publication had been the only notice, the motion to dismiss should have been granted; but, afterwards, May 2, 1885, thirty days before the time appointed for the taking of testimony and the final hearing, Allen having, as he states, learned of Leet's return, caused a printed copy of the notice of contest, cut from the newspaper in which publication had been made, to be personally served on Leet. The fact of this service is admitted, but it is contended on the part of contestee that the service of such printed copy is not a compliance with the rule, and (2) That the affidavit of the person who served this printed copy is insufficient because while it states the time and manner, it does not state the place of such service. These objections are not well taken. A "copy" is all that is required and it matters not, whether it be written or printed, or partly written and partly printed. The provision of Rule 15 that the affidavit therein required, shall state the *place* of service, is not material in cases where the *fact* of service is admitted or undisputed.

I am of the opinion, therefore, that the personal service and the proof thereof in this case were sufficient.

The allegation of the affidavit of contest is, "that the said Dexter Leet has failed to break or cause to be broken five acres of said tract up to the inception of this contest."

The contestee duly filed a motion, in the nature of a demurrer, to dismiss the contest, because the ground alleged in the affidavit is not sufficient in law to authorize the cancellation of the entry.

The statute requires the entryman, if a quarter section be entered, "to break or plow five acres" covered by the entry the first year.

It is contended on the part of the contestee that the words "break" and "plow" have distinct significations, and, as the statute would be

satisfied by a compliance with either requirement, the allegation of a failure to do one alone is insufficient. The point is not well taken in this case. A plowing necessarily includes a breaking and proof of plowing would be an answer to the charge of a failure to break.

It appears, however, from the evidence, that twelve or fifteen acres of the land had been broken in 1881 and in 1883, the year before Leet's entry, this broken land had been planted to wheat. In the fall of 1884, during the first year after his entry, Leet harrowed the land so broken. After this harrowing, Leet was afflicted with sore eyes, which disabled him for five or six months during that year and resulted in the loss of one of his eyes. During the second year (1885), Leet planted the land harrowed the previous year to corn and it was admitted by the contestant that a good crop of corn was growing on this land at the time the testimony was taken, June 4, 1885. It is true this corn was planted after the initiation of the contest, but the fact that it made a good crop, shows that the harrowing done by Leet the first year was a sufficient breaking to enable Leet to cultivate the land to a crop the second year. Any breaking of the required amount of land the first year sufficient to put it in condition for cultivation "to crop or otherwise" the second year is a compliance with the statute, and if the breaking be sufficient for that purpose, it matters not whether it be done by plow or harrow.

On the evidence in this case, I am of the opinion, the contest should have been decided in favor of the claimant, Leet, and your decision to the contrary and remanding the case for a rehearing because of insufficient service of notice, is accordingly reversed.

PRE-EMPTION—DEVISEE—FILING.

HANCOCK v. JOHNSON.

Section 2269 of the Revised Statutes does not authorize the executor of a deceased settler to file the papers necessary to the completion of a pre-emption claim, for the benefit of one claiming as a devisee.

The failure of the settler to file a declaratory statement, though due opportunity was afforded in her lifetime, and the neglect of the executor to make such filing, until after his discharge, preclude the subsequent assertion of a pre-emption claim.

Secretary Vilas to Commissioner Stockslager, May 11, 1888.

The appeal in this case is by Johnson, executor, etc., from your decision of July 2, 1886, holding for cancellation the pre-emption declaratory statement filed by him for the N. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of Sec. 15, R. 2 E., S. B. M., Los Angeles, California.

The facts in this case appear to be stated with substantial correctness in your decision, and the conclusion you arrive at is affirmed. A better reason for that conclusion, however, appears to me to exist than I find to be stated in it. Johnson seeks by virtue of section 2269, R. S., to complete the exercise of an alleged pre-emption right, claimed to have attached in favor of Mrs. Smith in her lifetime to the land in question.

He claims this, however, for his own benefit as her sole devisee under the will of which he is executor. He was not her natural or legal heir, and has no other claim than as devisee. The statute does not appear to recognize any right of this kind in a devisee. It provides that the executor or administrator of the deceased party entitled to claim the benefits of the pre-emption laws in respect to a particular tract of land, or one of his heirs, may file in due time all the papers essential to the establishment of the claim, and adds, "But the entry in such cases shall be made in favor of the heirs of the deceased pre-emptor, and a patent thereon shall cause the title to inure to such heirs, as if their names had been specially mentioned."

The descent of this right of a devisee is not provided for; and the want of this provision is to be given more especial effect because, under the homestead law, (Sec. 2291, R. S.) the devisee is particularly mentioned as one authorized to take the acquired rights of a homesteader.

I approve your decision also upon one of the grounds stated in it. Mrs. Smith's only claim to this land was by virtue of alleged settlement and residence upon it. Yet she never filed any declaratory statement as required by law, notwithstanding she survived ten months after the filing of the township plat, during which she was physically and mentally competent to have taken such action. And, after her death, Johnson settled the estate as her executor, and was discharged from that trust by the court, before attempting to file the declaratory statement. Under such circumstances, the claim to a pre-emption right must undoubtedly be denied.

These appear to me solid legal reasons for denying this application; being so, there was no occasion for the use of language in the opinion reflecting upon the character, the business or the attempt of the appellant to make this entry. A decision of this Department, referred to in your communication to the register and receiver, authorized him to file the application. It was a right thus doubly given him to make the claim, and, although it be denied, there appears to be nothing to require from your office or the Department any words of reproach for presenting it; nothing is gained to the judicial character of the decision by the introduction of harsh language in respect to the party.

HOMESTEAD ENTRY—ADMINISTRATOR—RELINQUISHMENT.

PETER W. BENNET.

Possession by an administrator is, under the homestead laws, possession by the heirs, and the right of possession rests in the administrator as such.

An administrator, acting under direction of the court, on the finding of fact that no heir or heirs survive, qualified to succeed to the rights of the deceased homesteader, is authorized to execute a relinquishment of the entry.

Secretary Vilas to Commissioner Stockslager, May 11, 1888.

I have considered the appeal of Peter W. Bennet from your decision of June 17, 1886, holding for cancellation his homestead entry, No. 7732,

made October 6, 1885, and embracing the W. $\frac{1}{2}$ of NE. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of Sec. 35, T. 33 N., R. 3 E., Olympia, Washington Territory, land district.

It appears that one Albert H. Brewster made homestead entry, No. 4666, February 8, 1883, for the tract described; that he died June 19, 1885, leaving no heirs other than his mother, Lydia Bishop, a resident of New Brunswick, and who does not appear to be qualified to succeed to the rights of Brewster under his homestead entry, it not being shown that she is a citizen of the United States, or that she has declared her intention to become a citizen.

October 5, 1885, the local office canceled the entry of Brewster, on a relinquishment filed by Reuben L. Peck, as administrator of the estate of said Albert H. Brewster, deceased, and on the same day Peter W. Bennet, the appellant, made homestead entry, No. 7732, of the tract.

One Rebecca Turner claimed an interest in the land, alleging that she had bought of Lydia Bishop, mother of the deceased entryman, Brewster, a relinquishment of his homestead entry, No. 4666, paying two hundred and fifty dollars therefor.

It appears that the so-called relinquishment by Lydia Bishop, the mother and sole heir of the deceased entryman, was in fact a deed executed by said Lydia Bishop of the land to said Rebecca Turner. This so-called relinquishment was rejected by the local officers, "because said relinquishment was not to the United States."

Turner then asked that a hearing be ordered to determine her right to the tract in question. Your decision under consideration declined to order the hearing asked for by Turner, "for the reason that it is not shown or alleged that the relinquishment alleged to have been presented by her was executed by a party qualified to do so." She has not appealed from that judgment, and the matter is only referred to here as a part of the history of the case.

The only question here for consideration is that presented by the appeal of Bennet from your said decision of June 17, 1886.

The record shows, as has already been indicated, that on October 6, 1885, the date on which Peck, as administrator of the estate of Albert H. Brewster, deceased, filed a relinquishment of the Brewster entry, Bennet applied to enter the tract so relinquished, being the tract in question, and that his application was allowed by the local officers, and he made homestead entry of said tract on that day.

Your decision holds that Peck, as administrator, was without authority to relinquish, and that the relinquishment by him was consequently without effect, although it had been filed pursuant to direction of the probate judge in and for the county in which the land is situated. You accordingly directed the re-instatement of the Brewster entry, No. 4666, and held for cancellation the homestead entry, No. 7732, of Bennet, and it is from that action that the latter appeals.

In view of all the circumstances, I think your action was error. It is

true that the homestead law does not, as does the pre-emption law, provide, in case of the death of a claimant, for the completion of his claim and the making of final proof by an administrator. From this the inference may naturally be drawn that a relinquishment of a homestead entry by an administrator acting in such capacity is without effect.

On the other hand, on a showing that the claimant is dead and that there is no widow or devisee, and no heir qualified to succeed to the claim, I can see no good purpose to be subserved by keeping of record a homestead entry and thus causing the land covered thereby to remain segregated to the detriment of public interest and of those seeking to claim as *bona fide* settlers.

In this case the administrator acted under the direction of the probate court having jurisdiction to direct his acts as administrator. The direction to relinquish was given on evidence which satisfied the court that there was no widow, devisee, or heir capable of succeeding to the entry.

It has time and again been held by this Department that possession by an administrator is, under the homestead laws, possession by the heirs (*Dorame v. Towers*, 2 C. L. L., 438; *Cleary v. Smith*, 3 L. D., 465; *Tauer v. the heirs of Mann*, 4 L. D., 433). This clearly implies the right of possession by the administrator, as such.

It would seem to follow that the finding of fact that no heir or heirs survive to take the land would terminate the right of possession by the administrator. When he, acting under direction of the probate court, which made the finding, and which has jurisdiction over his acts, relinquishes the entry, he then furnishes the evidence to the records of the land office which shows that his right of possession has ceased, and that there is no one entitled to succeed to the entry. While the statute does not in terms authorize an administrator to relinquish in such case, it does not prohibit such relinquishment, though recognizing his relation to homestead claims of deceased entrymen, even to the extent of authorizing him in certain cases to sell the land. *Vide* Sec. 2292 of the Revised Statutes. If he may sell in the interest of minor children of a deceased entryman, as the section of the law cited provides he may, then, in the absence of any inhibition, the spirit and purpose of the law, by parity of reasoning, would seem to justify the recognition of his relinquishment, filed under an order of a probate court, and upon evidence that there are no heirs to take the entry.

This principle has been recognized and acted upon by your office. See the case of *Susan W. Carter* (2 C. L. O., 99), in which it was ruled that an administrator or guardian can not be allowed to relinquish a homestead entry without the authority of the probate court having jurisdiction. This is equivalent to saying that under such authority he may relinquish, and such view, when the direction is given on proof that there are no heirs, is, I think, consonant with reason and the spirit and purpose of the law.

In this case the relinquishment stated in the body thereof that it was filed pursuant to an order of the probate court, and with it was filed a transcript of said order, setting forth the fact that the only heir at law of the deceased entryman was his mother, a citizen and resident of New Brunswick, Dominion of Canada. She, not being qualified to succeed to the entry, can have no valid claim thereto.

The sum of the whole matter is, that the administrator has no power to relinquish any right of an heir or widow for whom and because of whose right he may take possession after decease of the entryman and his own appointment; but, as he may take such possession conditionally and provisionally, he may, when there proves to be no widow or heir entitled to perfect the homestead entry, relinquish it, stating the facts. His relinquishment declares only the facts upon which the land has become public again; and there seems no reason to delay the entry of another settler, who must take subject to the facts. His relinquishment does not re-instate the land as public, but the facts do, and his act, under order of the probate court, is a sufficient foundation for proceeding according to the facts.

Upon the facts, there being no heir capable of taking, I am of opinion, for the reasons stated, that the local officers acted properly in accepting the relinquishment of the administrator and canceling the entry of Brewster thereon.

Your decision is accordingly reversed. The Brewster entry will stand canceled as of the date when the relinquishment was filed, and the entry of Bennett will remain intact, subject to his compliance with the law. He, it appears, has offered final proof on his entry. That, however, has not been acted upon by your office, and is therefore not passed upon here.

TOWNSITE—PRE-EMPTION—ACREAGE.

COYNE *v.* TOWNSITE OF CROOK ET AL.

The law does not prescribe the number of acres that may be taken as the site of a town containing less than one hundred inhabitants. In such cases the extent of acreage is a matter of executive discretion, and is restricted to the land actually occupied for town purposes, by legal sub-divisions.

Secretary Vilas to Commissioner Stockslager, May 11, 1888.

I have considered the case involving the several claims of James Coyne, Thomas Newman, James L. Denman, and the Townsite of Crook, to certain lands in sections 28 and 33, T. 6 N. R. 4 E., Black Hills meridian, Dakota Territory.

Said tract was formerly embraced in the Sioux Indian reservation, but became open to settlement and subject to disposal as public lands on February 28, 1877. The plat of survey was filed in the local office March 17, 1879.

March 25, 1879, Coyne filed pre-emption declaratory statement No. 74, for the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 33, township and range above mentioned, alleging settlement May 15, 1876.

May 31, 1879, J. V. Offenbacher, as probate judge of the county, filed pre-emption declaratory statement No. 165, for the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 33, and the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 28, for the use and benefit of the inhabitants of Crook City.

* * * * *

Your office decision of August 2, 1886, holds Coyne's filing for cancellation; holds for cancellation the filing for the benefit of Crook City, except the forty acre tract actually occupied by the few remaining residents and places of business; suspends Denman's entry, directing that if your decision should become final he be allowed to elect which one of the three remaining forties he will retain, or whether he will relinquish the entire tract.

From this decision the town-site, Coyne, and Denman, respectively appeal.

Crook City, through its attorney, appeals from so much of said decision as holds for cancellation all the tract covered by its original filing except the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 33, upon the grounds, "(1) that your office erred in holding that the town had abandoned its claim to the other three forties; (2) that the town-site is a unity, an entirety, and your office erred in dividing it and limiting it to less than the minimum acreage prescribed by law for town-sites."

The law prescribing the "acreage" of town-sites is found in section 2389, Revised Statutes, which says that a town-site:

Where the inhabitants are in number one hundred and less than two hundred, shall embrace not exceeding three hundred and twenty acres: and in cases where the inhabitants of such town are more than two hundred and less than one thousand, shall embrace not exceeding six hundred and forty acres, etc.

There is no law prescribing the acreage of the sites of towns containing less than one hundred inhabitants. In such case, therefore, the acreage would seem to be a matter of executive discretion. Your office and the Department have directed what action should be taken in such case, in the circular approved November 5, 1886 (5 L. D., 268, paragraph 9).

When the number of inhabitants of a town is less than one hundred, the town-site shall be restricted to the land actually occupied for town purposes, by legal subdivisions.

It is true, the decision of your office in the case at bar was made three months before the circular above cited was promulgated; but the circular simply stated the uniform preceding practice of your office, and I see no reason why said practice, or your decision herein in accordance therewith restricting the town-site "to the land actually occupied for town purposes," should be disturbed.

* * * * *

FORFEITED RAILROAD LANDS—ACT OF JANUARY 31, 1885.

NORTHERN PAC. R. R. CO. *v.* ANDERSON.

The grant to the Oregon Central was not limited to lands within the state of Oregon. Priority of grant determines the right to lands lying within common granted limits. An applicant for the preference right of purchase, accorded by section two of the forfeiting act of January 31, 1885, must show that he is an actual settler in good faith.

One temporarily occupying land as the employe of a business firm or company, is not an actual settler under said act, nor authorized thereby to appropriate, by purchase of the land, valuable improvements placed thereon for the benefit of said company.

Secretary Vilas to Commissioner Stockslager, May 14, 1888.

By letter of July 2, 1886, your office rejected the "selection" of the Northern Pacific Railroad Company for Lots 3, 4 and 5, and the S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 7, T. 9 N., R. 6 W., Vancouver, Washington Territory, and allowed Andy P. Anderson to purchase the same under the act of January 31, 1885. (23 Stat., 296.)

The company appealed.

The land is within the limits of the grant to the Oregon Central Railroad Company by act of May 4, 1870 (16 Stat., 94), and within the limits of the grant made to the Northern Pacific company by the joint resolution of May 31, 1870 (16 Stat., 378) as shown by the map of definite location filed September 13, 1873.

Appellant urges that the grant to the Oregon Central did not embrace lands outside of the State of Oregon, and that this tract being in Washington Territory was not included in that grant, although topographically within the limits prescribed by the act. This question was considered in the case of the Northern Pacific Railroad Company *v.* United States (6 L. D., 292), and it was held that the grant to the Oregon Central road *did* extend into Washington Territory.

The grant to the Oregon Central was of odd numbered sections "not otherwise disposed of or reserved or held by valid pre-emption or homestead right at the time of the passage of this act".

Priority of grant determines the right to lands lying within common granted limits. Missouri, Kansas, & Texas Ry. Co. *v.* Kansas Pacific Ry. Co. (97 U. S., 491); Jarrett *v.* Missouri, Kansas, & Texas Ry. Co. (5 L. D., 135)

At the date of the grant to the Northern Pacific company, and of its definite location the land was embraced in the grant to the Oregon Central road, and therefore excepted from the operation of the later grant. The Northern Pacific Company has no legal claim to this tract.

By act of January 31, 1885 (23 Stat., 296), the granted lands along the uncompleted portions of the Oregon Central road were declared forfeited to the United States and restored to the public domain. The tracts in question are embraced in the forfeiture.

Section 2 of the forfeiting act provided :

That all persons who at the date of the passage of this act are actual settlers in good faith on any of the lands hereby forfeited, and who are otherwise qualified, on making due claim to such lands under the homestead, pre-emption, or other laws, within six months after the same shall have been declared forfeited, shall be entitled to a preference right to enter the same in accordance with the provisions of this act and of the homestead, pre-emption, or other laws, as the case may be, and shall be regarded as having legally settled upon and occupied said lands under said pre-emption, homestead or other laws, as the case may be, from the date of such actual settlement or occupation ; and in case any such settler may not be entitled to thus enter or acquire such land under existing laws, he shall be permitted, within one year after the passage of this act, to purchase not to exceed one hundred and sixty acres of the same, at the price of one dollar and twenty-five cents per acre ; and the Secretary of the Interior is hereby authorized and directed to make such rules and regulations as will secure to said actual settlers the benefit of these rights: *Provided*, That the price of the even numbered sections within the limits of said grant and adjacent to and co-terminous with the uncompleted portions of said road, and not embraced within the limits of said grant for the completed portions of said road is hereby reduced to one dollar and twenty-five cents per acre.

On January 31, 1886, Andy P. Anderson applied at the local office to purchase said tracts under said second section. He alleges in a duly corroborated affidavit that "about twelve years ago" one B. D. Hume purchased this land from the Northern Pacific railroad company and built thereon a dwelling house worth \$5000, and "the greater portion of a cannery or fish factory" valued at \$15,000; that said last building has been occupied as a cannery ever since, and that Hume lived in said dwelling house with his family. That in 1881, said property was purchased by the Ocean Canning Company, that he, Anderson was, and is now one of the principal stockholders in said company, and superintendent and manager of the same, that he has lived upon and occupied said premises ever since said company's said purchase ; that the land is rocky and precipitous, arising abruptly from the waters edge and is not suitable or fit for agricultural purposes, that it has been and is now used for the purposes of business and trade."

It will be noted that the forfeiting act gives certain preference rights to actual settlers in good faith on any of the lands forfeited.

The record here presented does not satisfactorily disclose the nature of claimant's alleged settlement. If he is temporarily occupying the land merely as the servant of the Ocean Canning Company I do not think such occupancy would constitute him an actual settler in good faith under the act, so as to empower him by purchase to appropriate the valuable improvements of the company. If, however, he made settlement on the land in good faith, and his claim is not antagonized by that of the company, nor its approval affect any other rights or equities, I see no reason why his entry should not stand. You will therefore require the claimant to furnish such evidence on these points as will

satisfactorily dispose of* them within sixty days from notice hereof. Meantime his certificate of purchase will be suspended.

Said decision is accordingly modified, and the papers in the case are herewith returned.

RAILROAD GRANTS—CONFLICTING LIMITS; APPLICATION.

COBLE v. SOUTHERN PAC. R. R. CO.

Under section 23 of the act of March 3, 1871, lands embraced within the indemnity limits of the Atlantic and Pacific Railroad were excepted from the grant to the Southern Pacific.

On the forfeiture of a railroad grant, an application to enter land embraced therein, pending on appeal, may be allowed.

Acting Secretary Muldrow to Acting Commissioner Stockslager, January 11, 1888.

On June 29, 1886, Wesley Coble made application to enter under the homestead laws the NW. $\frac{1}{4}$ of Sec. 27, T. 1 N., R. 8 W., S. B. M., Los Angeles land district, California; and same day his application was rejected "on the ground that said tract is within the withdrawal for the Southern Pacific Railroad Company."

An appeal was taken, claimant alleging that the tract in question was, at the date of the attachment of the company's grant to lands along its line, within the claimed limits of the Rancho San Jose and consequently excepted from the grant to said company, and that being subsequently released from the reservation on account of said private grant was public land at the date of his application, and properly subject to entry.

On August 13, 1886, your office affirmed the action of the register and receiver and from this affirmance the case is here on appeal.

The tract in question is within the twenty miles or primary limits of the grant of March 3, 1871 (16 Stat., 579) to the Southern Pacific Railroad Company, branch line, as shown by the map of designated route filed April 3, 1871, when the rights of the company were determined.

The township plat was filed September 21, 1875; the land was not within the claimed limits of the San Jose Rancho and no filing or entry being of record, was listed by the said company December 6, 1884, as of its granted lands.

But the records of your office show that said tract is also within the thirty miles, or indemnity limits of the grant of July 27, 1866 (14 Stat., 292) to the Atlantic and Pacific Railroad Company as ascertained by the map of designated route filed March 12, 1872, on which withdrawal was ordered April 22, 1872.

By the twenty-third section of the act of March 3, 1871, *supra*, making the grant to the branch line of the Southern Pacific Company it

was provided: "That this section shall in no way affect or impair the right, present or prospective of the Atlantic and Pacific Company, or any other railroad company."

In the case of *Gordon v. Southern Pacific Railroad Company* (5 L. D., 691), it was held that, under this proviso, land "embraced within the indemnity withdrawal for the Atlantic and Pacific Company gave to that company a prospective right, which excepted the tract from the Southern Pacific grant."

Under this decision it is apparent that the tract in question did not pass under the grant to the Southern Pacific Company, but was excepted therefrom because of the grant to the Atlantic and Pacific Company.

By act of July 6, 1886 (24 Stat., 123), all lands "which are adjacent to and coterminous with the uncompleted portions of the main line" of the Atlantic and Pacific Railroad were "declared forfeited and restored to the public domain."

The tract sought to be entered by Coble is opposite to the uncompleted portions of said road, and consequently was of the lands forfeited and restored to the public domain by said last act; and though his application to enter was prematurely made, by a few days and therefore properly rejected by the register and receiver, I see no reason why it should not have been allowed by your office when before it.

I therefore reverse your decision, direct the cancellation of the selection or listing by the Southern Pacific Company of said tract, and the allowance of the entry of Coble upon his making proper showing as to his qualifications to make the same.

SCHOOL INDEMNITY—VALIDITY OF SELECTION.

MCKENZIE *v.* THE STATE OF CALIFORNIA.

A school indemnity selection, made on a valid basis, but covering, in part, lands excluded from selection, may be approved as to the tracts subject to selection.

A selection improperly allowed, because of a prior pending claim, may be permitted to stand, on the removal of such claim from the record.

JANUARY 5, 1885.

THE COMMISSIONER OF THE GENERAL LAND OFFICE:

SIR: January 5, 1885, Hugh McKenzie made application to enter under the timber and stone law of June 3, 1878 (20 Stat., 89), the S. $\frac{1}{4}$ of SW. $\frac{1}{4}$ and W. $\frac{1}{2}$ of SE. $\frac{1}{4}$, Sec. 29, T. 18 N., R. 1 E., H. M., Humboldt, California. His application was rejected by the local officers, because said tracts were embraced in an indemnity school selection made December 12, 1884, per list No. 50. Upon appeal your office, under date of March 23, 1887, reversed the decision of the local officers, held said State selection for cancellation, and allowed said application of Mc-

Kenzie to proceed to entry. Appeal from this decision brings the case here.

The tracts above specified are embraced in the following indemnity school selection, made December 12, 1884, per list No. 50, "amending R. & R. No. 39, filed April 14, 1884":

No. 1236—N. $\frac{1}{2}$ of NE. $\frac{1}{4}$ Sec. 31, S. $\frac{1}{2}$ of SE. $\frac{1}{4}$ Sec. 30, and S. $\frac{1}{2}$ of SW. $\frac{1}{4}$ and W. $\frac{1}{2}$ of SE. $\frac{1}{4}$ Sec. 29, all in township 18 N., range 1 E., H. M., based on fractional township 12 N., range 8 E., H. M., 320 acres.

Your office rejected this selection entire and held it for cancellation, because at the date when it was made the N. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of said Sec. 31 was embraced in homestead entry No. 2242 of Leonard White, made June 12, 1884, settlement alleged in 1882.

It is shown that when this selection was made there was no claim to the particular tracts applied for now by McKenzie, neither was there any claim to the SW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of said Sec. 30. The only claims to any of the lands in this selection then were the homestead claim of White (*supra*) and a pre-emption claim of one Sevoy to the SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of said Sec. 30, along with other lands not in controversy in this case. The said homestead entry of White was relinquished and canceled May 12, 1886.

I am not favorably impressed with the view of your office in this case. The basis of this selection was valid, so far as appears from this record, when the selection was made, and in that respect this case differs materially from the case of Barclay v. McLeod, now under consideration. The one hundred and sixty acres in section 29, and at least forty acres in section 30, were subject to selection when said selection was made, and I can see no good reason why the selection as to those tracts should not be allowed. To allow it would be in harmony with the general practice relative to entries by individuals, viz: That where an entry of one hundred and sixty acres has been made, and it is afterwards ascertained that a portion of the land thus entered is not subject to entry, the original entry is allowed to stand as to that portion of the land that was subject to entry. This practice has never resulted injuriously in the matter of entries, and I can see no harm that can follow from adopting it in the matter of State selections.

With reference to the tract of land included in the homestead entry of White when the selection was made, which entry has since been relinquished and canceled, it would seem that an equitable and just rule would be to allow the State selection of it, also. While it is true that the tract was not subject to selection when the selection was made, yet the selection was allowed by the local officers to go to record, and the only objection to its validity has since been removed.

To allow it would be to follow a practice analogous to that prevailing with reference to entries by individuals, viz: that an entry having been allowed to go of record improperly because the land embraced in it was then otherwise appropriated, is permitted to remain intact if the

prior claim is removed. Alexander Polson (4 L. D. 364), Owen D. Downey (6 id., 23). I can discover no harm that can result from this ruling, and it seems to me eminently equitable and just. In support of this view, see *Durand v. Martin* (120 U. S., 366).

State selection No. 1236, with the exception of the tract claimed by Sevoy, is allowed to remain intact; and as to that tract another decision will be rendered.

The application of McKenzie is denied, and the decision appealed from reversed.

Very respectfully,

Secretary.

FEBRUARY 10, 1888.

This case was fully considered by Secretary Lamar before he left the Department, and after hearing argument he directed the foregoing opinion to be prepared for his signature; and I am informed that he intended to sign it, and thought he had done so. I have carefully examined it, believe it to be correct, and now adopt it.

Very respectfully,

H. L. MULBROW,
Acting Secretary.

PRACTICE—MOTION TO DISMISS.

KELLY v. BUTLER.

Where a motion to dismiss, for the want of sufficient evidence, is sustained by the local office, the entry should not thereafter be canceled without according the defendant an opportunity to submit evidence.

Secretary Vilas to Commissioner Stockslager, May 17, 1888.

I have considered the case of William E. Kelly v. Arthur W. Butler on appeal by the latter from your office decision of June 10, 1886, holding for cancellation his timber culture entry for the NW. $\frac{1}{4}$ of Sec. 22, T. 129 N., R. 45 W., Fergus Falls land district, Minnesota.

Butler made timber culture entry for said tract June 7, 1882, and on June 8, 1885 Kelly initiated contest against said entry alleging "that the said Arthur W. Butler has failed to plant or cause to be planted to trees, tree seeds or cuttings five acres of ground on said tract since said entry was filed; that not over nine square rods of ground on said tract has ever been planted to trees, tree seeds or cuttings by the said claimant or other person."

Personal service of notice of contest was had upon the entryman. On the day set for the hearing the contestant appeared in person and by attorney and the entryman appeared by attorney. After disposition

had been made of several preliminary motions, the taking of testimony was begun before the register, the receiver not being present. The contestant submitted the testimony of himself and two witnesses and rested his case thereon, whereupon the defendant moved to dismiss the contest "for the reason that the contestant has failed to show by satisfactory evidence that there has been any neglect to comply with the requirements of the timber culture act." This motion was sustained by the register and the case dismissed. There was no appeal from this action, but the papers together with the written opinion of the register dismissing the contest and the opinion of the receiver holding that the allegations of the contest affidavit had been sustained; that the entry was being held for the benefit of a third party; and that the case should not have been dismissed, but that the entry should have been held for cancellation were transmitted to your office, where it was decided June 10, 1886, that "a failure to comply with the law has been established and the entry is accordingly held for cancellation."

From that decision the entryman appealed asking that said entry be allowed to stand intact or that a rehearing be ordered and all parties be permitted to show the facts in the case.

There is manifest error in the decision appealed from. If the motion to dismiss had been overruled by the local officers the contestee would have had a right to offer evidence to rebut that submitted by the contestant, and he ought not to be denied this right because the decision of the local officer in his favor is held by your office to have been in error. The practice heretofore has been to treat such a motion like one for a non-suit and not as a demurrer to the evidence.

The testimony submitted shows that ten acres of said land had been plowed and that it was planted in oats in the spring of 1885, but that there was nothing to show that any trees, tree seeds or cuttings had ever been planted there. Upon cross examination when asked if tree seeds might have been sowed in the spring with the oats, the witnesses admit that such might have been the case as they were not present when the oats were sowed. The contestant states, however, that immediately preceding the initiation of contest he examined said land carefully and dug down in the ground in four or five different places but found no traces of any tree seeds there. This testimony shows *prima facie* that the entryman had not complied with the law, and it was therefore error on the part of the local officer to dismiss the contest.

Your office should have directed the register and receiver to continue the hearing after giving all parties due notice of the time set for such hearing, and that in event the contestee failed to offer evidence in his behalf, said entry should be canceled. *James Copeland* (4 L. D., 275); *McMahon v. Gray* (5 L. D., 58).

Your said office decision is modified to conform with the views herein set forth.

CALIFORNIA SWAMP LAND—PROCEEDINGS BEFORE THE SURVEYOR GENERAL.

STATE OF CALIFORNIA *v.* THE UNITED STATES.

Testimony as to the character of land, submitted by the State under section 2488 of the Revised Statutes, must be taken before the surveyor general.

Secretary Vilas to Commissioner Stockslager, May 17, 1888.

I have considered the case of the State of California, *ex rel.* T. M. Loop *v.* United States on appeal by the former from your office decision of May 21, 1886, rejecting the proofs taken in the matter of the claim of said State to Lot 4, being the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 25, T. 14 S., R. 4 W., S. B. M., California, under the swamp land grant of September 28, 1850.

The statute providing for the taking of testimony in such cases is clear and explicit in the statement that it shall be taken before the surveyor general, and leaves no room for a doubt as to the construction to be given it.

Since I concur in the conclusion reached in your said office decision the same is hereby affirmed.

COMMISSIONER'S DECISION.

Acting Commissioner Stockslager to United States Surveyor General, San Francisco, Cal. May 21, 1886.

I have examined the papers, transmitted to this office, January 16, 1886, by your predecessor, W. H. Brown, in the matter of the claim of the State of California, to Lot 4, or the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 25, township 14 south, range 4 west, San Bernardino Meridian, California, under the swamp land grant of September 28, 1850, with his report and opinion.

The evidence on which his opinion is founded consists entirely of depositions taken before the deputy of J. M. Dodge, county clerk of San Diego county, California.

If the State is entitled to said land, it is because it has been segregated as swamp land either by the United States surveyor, or prior to July 23, 1866, by the State of California by a survey in conformity with the system of surveys adopted by the United States, or shall appear from testimony taken in accordance with law to be actually swamp land.

Said tract is not represented as swamp land on the map, or in the returns of the surveyors, and in such cases it is provided as follows:

"If the authorities of said State shall claim as swamp and overflowed any land not represented as such upon the map or in the returns of the surveyors, the character of such land at the date of the grant, September 28, 1850, and the right to the same, shall be determined by testimony to be taken before the surveyor general, who shall decide the same, subject to the approval of the Commissioner of the General

Land Office." See Statutes at Large, Vol. 14, p. 218, *et seq.*, Revised Statutes, Section 2488.

Said act makes no provision for taking testimony before any other than the surveyor general, hence the depositions taken before said deputy clerk, were taken without authority of law and are therefore rejected, and the opinion and decision of the said surveyor general founded thereon is not approved. You will advise the parties in interest of this action and allow the usual time for appeal.

I return herewith the papers containing the correspondence in the case—to wit, Nos. 1 to 16 inclusive; also 19, 20, 22, 24 and 25 as named in the schedule sent by the surveyor general.

If the State or those claiming under it, desire to present testimony in the manner prescribed by law to show that said tract was swamp land at the date of the grant, you will institute proceedings as heretofore directed, and make due report of the same.

It will be seen from the correspondence that Mr. W. S. Weed had made application to enter the land as a homestead, so that in any future investigation he must be made a party and be permitted to present evidence of the non-swampy character of the land.

PRIVATE ENTRY—OFFERED LAND—ACT OF JANUARY 31, 1885.

JAMES STEEL.

Lands once offered, but subsequently included in the grant to the Oregon Central Railroad, and thereafter restored to the public domain by the act of January 31, 1885, which declared a forfeiture of said grant, were not thereby restored to private cash entry.

Secretary Vilas to Commissioner Stockslager, May 17, 1888.

I have considered the appeal of James Steel from the decision of your office, dated December 24, 1885, rejecting his application to make private cash entry of the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 19, T. 8. N., R. 6 W., W. M., Oregon City land district, Oregon.

The record shows that said tract was offered on October 6, 1862; that it is within the twenty mile, or granted, limits of the grant to the Oregon Central Railroad Company, by act of Congress, approved May 4, 1870 (16 Stat., 94); that Steel made private cash entry, No. 1081, of said tract on September 13, 1871, which was canceled by your office on February 24, 1874; that Steel made application to have his purchase money refunded, which was granted and his entry canceled, in accordance with the decision of Secretary Delano, rendered March 22, 1873 (L. & R., Vol. 15, p. 184).

Steel avers that some time after making said entry he was informed by the register of said land office that the tract in question was included within the grant to said company, and that, upon the advice of said

officer, he purchased said land from the railroad company, agreeing to pay for the same in ten annual instalments, and the company agreeing to make him a deed to the land, so soon as it should receive a patent therefor: that he made said payments up to the time when said lands were forfeited.

Said company having failed to construct its road, by act of Congress approved January 31, 1885 (23 Stat., 296), the lands granted for the construction of a railroad from Portland to Astoria and McMinnville in said State were forfeited and restored to the public domain.

The first section of said act of forfeiture provides that said lands are "made subject to disposal under the general land laws of the United States as though said grant had never been made."

The second section of said act provides:

That all persons who at the date of the passage of this act are actual settlers in good faith on any of the lands hereby forfeited, and who are otherwise qualified, on making due claim to such lands under the homestead, pre-emption, or other laws, within six months after the same shall have been declared forfeited, shall be entitled to a preference right to enter the same in accordance with the provisions of this act and of the homestead, pre-emption, or other laws, as the case may be, and shall be regarded as having legally settled upon and occupied said lands under said homestead, pre-emption, or other laws, as the case may be, from the date of such actual settlement or occupation; and in case any such settler may not be entitled to thus enter or acquire such land under existing laws, he shall be permitted, within one year after the passage of this act, to purchase not to exceed one hundred and sixty acres of the same, at the price of one dollar and twenty-five cents per acre; and the Secretary of the Interior is hereby authorized and directed to make such rules and regulations as will secure to said actual settlers the benefit of these rights: *Provided*, That the price of the even-numbered sections within the limits of said grant and adjacent to and co-terminous with the uncompleted portions of said road, and not embraced within the limits of said grant for the completed portions of said road, is hereby reduced to one dollar and twenty-five cents per acre.

It is contended that the words in the first section of said act, namely "are hereby declared to be forfeited to the United States and restored to the public domain, and made subject to disposal under the general land laws of the United States, as though said grant had never been made," operate *proprio rigore*, to place the lands in the same status that they were in at the date of the grant. In other words, that all lands that had been offered prior to said grant were restored by said act to the public domain and to private cash entry.

A careful examination of the whole act shows that the construction contended for by the appellant is unwarranted. The object of said act was "to declare a forfeiture of certain lands," and the clause "as though said grant had never been made" can be construed, with more propriety, as referring to the forfeiture and restoration of said lands to the public domain, and their subjection to the disposal, than to the manner of their "disposal under the general land laws of the United States."

Said words are used to render complete the prior declaration of forfeiture and restoration, and they do not mean to prescribe a rule for the disposal of said lands contrary to the uniform policy of the government. The grant to the extent of the forfeiture was simply blotted out, and the lands were restored to the public domain, for disposal under the general land laws, subject to the limitations of the second section, and in accordance with the general policy of the government.

This Department has uniformly ruled that where offered lands have been covered by entries, which have subsequently been canceled, such lands are not subject to private cash entry, until notice of restoration shall have been given. *Jefferson Newcomb* (2 C. L. O., 162); *S. N. Putnam* (2 C. L. L., 305).

In the case of *John C. Turpen* (5 L. D., 25), this Department held that lands which are withheld from public sale through erroneous markings on the plats or records, or by orders of your office, are not subject to private entry, except after public notice of restoration; that under the ninth section of the circular, issued by your office on January 1, 1836, as construed by the Hon. Attorney-General (3d Opin., 274), it was the duty of your office:

under the general supervision of the Secretary of the Treasury (now of the Interior) and through him of the President, to take care that the law is faithfully executed; that one of the most important points to be observed in the execution of the law is the securing to all persons a fair and equal opportunity to become purchasers of the public lands, and that where lands, subject by law to private entry, have been improperly withheld therefrom, if a considerable time has elapsed since the close of the sale, to allow them to be entered by any particular individual without a public notice that they are subject to private entry would, in most cases, give such individual a preference over the rest of the community, and not be a faithful execution of the law.

In the case of *Eldred v. Sexton* (19 Wall., 189), the supreme court of the United States held that it is a fundamental principle underlying the land system of this country that private entries are never permitted until after the lands have been exposed to public auction at the price for which they are afterwards subject to entry; that in the case under consideration, although the lands, falling within the limits of a railroad grant, had been offered at two dollars and fifty cents per acre, and by subsequent legislation it had been declared that "these lands should hereafter be sold at one dollar and twenty-five cents per acre," yet it was necessary to re-offer said lands before they would be subject to private entry. The court repudiated the idea that said "declaration fixed the price absolutely, and subjected them to private entry at that price, without any further proceeding," and held that:

Congress meant nothing more than to fix one dollar and twenty-five cents as their minimum price, and to place them in the same category with other public lands not affected by land grant legislation. When they were withdrawn from the operation of this legislation, and their exceptional status terminated, the general provisions of the land sys-

tem attached to them, and they could not, therefore, be sold at private entry, until all persons had the opportunity of bidding for them at public auction.

On July 8, 1885, Acting Secretary Muldrow approved the instructions issued by your office to the register and receiver at Oregon City, Oregon, wherein it is expressly stated that "the price of all lands within restored limits is one dollar and twenty-five cents per acre, but the same are not subject to sale at *ordinary private cash entry*."

Keeping in mind the uniform practice of the Department and the ruling of the court, as above set forth, and construing the whole act together, it is apparent that it was not the intention of Congress to restore the lands to private cash entry, even though the same had been offered prior to said grant.

The decision of your office is accordingly affirmed.

HOMESTEAD ENTRY—RESIDENCE—PENDING APPEAL.

JONES v. KENNETT.

On the cancellation of an entry, and the subsequent homestead entry of the same tract by another, the latter is not required to establish residence pending the disposition of an appeal from the order of cancellation, taken before the homesteader was bound to establish his residence.

Secretary Vilas to Commissioner Stockslager, May 17, 1888.

I have considered the appeal of Homer Kennett from your decision of April 3, 1886, holding for cancellation his homestead entry for lot 3, Sec. 29, T. 5 S., R. 3 W., Concordia, Kansas.

B. C. Sanders made homestead entry of this tract with other land, which was canceled by the Commissioner February 9, 1884. Kennett made entry of the tract February 16, 1884, the same day the Sanders entry was canceled on the records of the local office.

On April 7, 1884, Sanders appealed from the decision of your office cancelling his entry, and final decision was not made in the case until December 13, 1884, when the Secretary affirmed the action of the Commissioner.

Contest was initiated by Jones in August 1884, pending the appeal of Sanders before the Secretary, but hearing was not had until May 13, 1885, the case having been continued from March 30th.

The local officers dismissed the contest upon the ground that the six months allowed the entryman after entry in which to establish residence on the land, did not commence to run until the final decision of the Secretary. You reversed this decision, holding that Kennett was required to establish residence within six months after date of entry.

The appeal having been taken before the entryman was bound to establish actual residence, it would be unreasonable to require him

pending that appeal to go to an expense which might have been fruitless, and he was justified in awaiting the result, and the contest was properly dismissed as premature. The regulation must be applied with allowance of circumstances and not arbitrarily.

Hence the six months allowed him to establish actual residence on the land should not be held to include the time after appeal and before the final decision of the Department cancelling Sanders entry.

Your decision is reversed.

TIMBER CULTURE CONTEST—PREFERENCE RIGHT.

LINDERMAN v. WAIT.

In the fifth year of a timber culture entry it was attacked for non-compliance with law, the evidence showing a successful culture of the first year's planting, but a failure to cultivate and protect the trees planted the second year; *Held*, that as bad faith is not shown, the entry may be amended by relinquishing the forty acres on which no trees are growing, and the contestant awarded the preference right of entry to the tract thus relinquished.

Secretary Vilas to Commissioner Stockslager, May 17, 1888.

On March 15, 1879, Amelia Wait made timber culture entry No. 1123, on the W. $\frac{1}{2}$ of SE. $\frac{1}{4}$ Sec. 8, T. 109, R. 42, Tracy, Minnesota land district.

On October 25, 1884, James Linderman instituted a contest against said entry and at the same time filed his application to enter said tract under the timber culture laws. A hearing in the case was duly had on December the 10th following.

The local officers and your office find from the evidence adduced at the hearing that from two and a half to two and three quarters acres had been planted to timber trees which were at the time of the hearing in a fair condition, but that there had been a failure on the part of the entryman to cultivate and keep in a healthy growing condition the trees planted during the fourth year of the entry, and consequently that the entry must be canceled. From this decision of your office the case comes here on appeal.

A review of the evidence sustains your findings of fact. The only question therefore to be determined is whether these facts make it legally obligatory on the Department to wholly cancel the entry, or whether in the exercise of a sound discretion the entry may be canceled for a part of the land embraced therein, and permitted to stand for the remainder. In other words, whether a timber culture entry when once attacked must necessarily be treated as an entirety. Entries have frequently been treated as divisible where the government and the entryman alone have been concerned, but to so treat them where the interest of a third party has intervened would be a departure from the practice heretofore prevailing in the land department. This departure,

however, if made, would not violate positive statutory enactment, unsettle titles, nor disturb any established rule of property, and it seems to be demanded in the administration of the timber culture law by constantly recurring cases of extreme hardship. The timber culture act requires that an entry under it must be made in good faith and with the honest intention on the part of the entryman of planting, protecting and keeping in a healthy, growing condition the number of acres of trees contemplated by the act.

The evidence in this case shows that the entryman has not fully complied with the law, inasmuch as she has not cultivated and kept in a healthy, growing condition the fourth year's planting of two and a half acres, but it is also shown that the third year's planting of trees on more than two and a half acres has been kept in a healthy growing condition, and that there were about twenty-five hundred such trees on the south half of said tract. In the absence of bad faith, and there is no evidence of any element of bad faith in this case, it certainly does seem inequitable and unjust to deprive the claimant entirely of the fruits of her labor, and to permit another "to reap where he has not sown."

The timber culture act of June 14, 1878 (20 Stat., 113), provides, among other things, that a party—having the prescribed qualifications:

Who shall plant, protect, and keep in a healthy, growing condition for eight years two and one-half acres of timber on any legal subdivision of forty acres shall be entitled to a patent for the whole of said forty acres at the expiration of said eight years on making proof of such fact, etc.

If the claimant continues for the requisite period to keep these two and a half acres of timber trees in a healthy growing condition, the statute says she shall be entitled to a patent for the legal subdivision on which they are growing, on making proof of the fact.

To declare this forty acres now forfeited to the government it seems to me would be obviously unjust. On claimant's application, in the absence of an intervening right, there would be no hesitation in allowing her to relinquish one forty and to retain the other under her entry, and it does not appear to me that there is any such special sanctity in the contestant's right to enter the entire eighty as to require a declaration of forfeiture for his sole benefit.

This department has no inclination to disregard a contestant's rights, but these rights do not necessarily include the right to inflict injustice and wrong on another. In this case it is believed that his rights will be sufficiently guarded by securing to him the preference right of entering the forty included in this entry on which no trees are at present growing.

In view of all the facts and circumstances of this case, the claimant will be allowed thirty days after notice of this decision, to amend her original entry by relinquishing the same as to the north half of the above described land, leaving the same to stand intact as to the south

half thereof. But upon her failure within said time to file such relinquishment, then her said entire entry should stand canceled as directed in your decision appealed from.

TIMBER LAND—SETTLEMENT RIGHTS—ACT OF JUNE 3, 1878.

PORTER v. THROOP.

The act of June 3, 1878, providing for the sale of timber land, recognizes in terms the right to appropriate such lands under the settlement laws.

Settlement, however, on lands embraced within said act should be closely scrutinized, as the character of the land may, in connection with other facts in the case, affect the question of the settlers good faith.

Where the application to purchase under said act covers land embraced within a prior pre-emption claim, the burden of proof is upon the applicant to show the invalidity of such claim.

Secretary Vilas to Commissioner Stockslager, May 19, 1888.

I have considered the case of James R. Porter v. Thomas G. Throop, involving the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 31, and the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 32, T. 11 N., R. 13 W., San Francisco district, California.

It appears from the records that Throop May 25, 1885, filed declaratory statement No. 19,439, for the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of said section 31, and the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of said Sec. 32, alleging settlement thereon May 5, 1885.

On May 11, 1885, after Throop's alleged settlement but before his said filing, Porter filed application No. 1986 to purchase as timber land under act of June 3, 1878, the tract in controversy, which constitutes one hundred and twenty acres of the land embraced in Throop's said filing.

The contest arose on Porter's application to purchase and was tried by the local officers September 3, 1885, who held, that "Throop's residence has not been of such a character as would prevent any legal adverse claim from attaching to the land, and the only question to be considered is, whether the land is chiefly valuable for timber," and accordingly awarded to Porter two forties of the land (the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 32, and the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 31) as being under the evidence chiefly valuable for timber, and left the remaining forty (the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 32) subject to Porter's filing.

The decision of your office rendered July 8, 1886, found from the evidence that Throop had "complied with the law in making settlement and should be allowed all the time granted him by law within which to show his full compliance with its requirements;" and that "Porter's application be held subject to Throop's final proof."

Throop went upon the land May 5, 1885, the date of his alleged settlement, and built a house twelve by fourteen feet on the the SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of Sec. 31, the forty acre tract not included in Porter's application, and furnished it meagrely but so as to make it habitable, and occupied it one day in each week since his alleged settlement, and the remainder of the time was compelled to be absent at work for a living; and from the time of his alleged settlement till the trial, a period of not quite four months, the weather was so dry as to prevent cultivation of the land. About May 9, 1885, while Throop was building his house, Porter saw him and they had a conversation in reference to Throop's proposed filing, in which Throop says he told Porter he proposed to file upon the land in dispute, which Porter denies. Throop's testimony, however, is, to a certain extent, corroborated by the conduct of Porter, who, although he had lived in the immediate neighborhood of the land and had his stock grazing thereon for many years without taking any steps to secure it, yet immediately after his said interview with Throop, and after seeing him at work upon his house, hurried to the land office, a distance of seventy miles, and made application to purchase the land, which consists of two disconnected tracts on the east and west side of the forty acre tract on which Throop built his house. One forty of the tracts in dispute, the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 31, is contiguous to and west of the forty on which Throop built, and in the same section; as to this forty, Throop's acts of settlement were constructive notice to Porter of Throop's proposed filing thereon.

The two other forties in dispute, the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 32, lie east of the forty built upon by Throop and in a different section; as to these, the preponderance of the evidence, viewed in the light of Porter's conduct after his interview with Throop, shows that he had actual notice of Throop's proposed filing. Porter, then, was chargeable with notice of Throop's claim to the entire tract, embracing the land in dispute, and while as a matter of fact, there were no improvements or settlement on the one hundred and twenty acres of land in dispute, in contemplation of law, Throop's improvements and settlement on the forty acre tract not in dispute, covered the entire tract.

It is expressly declared in the first section of the act of June 3, 1878: "That nothing herein contained shall defeat or impair any *bona fide* claim under any law of the United States, or authorize the sale of . . . the improvements of any *bona fide* settler."

As is said in the case of *Hughes v. Tipton* (2 L. D., 334), "this act evidently discriminates in favor of the *bona fide* settler," and as it "is opposed to the general policy of the settlement laws, in allowing the mere speculator to appropriate land if he be first in time, it should have a strict construction" in favor of the *bona fide* settler as against the timber applicant. *Rowland v. Clemens* (2 L. D., 633). To allow Porter's application for a half or three-fourths of the tract covered by

Throop's claim, is to seriously "impair" it, and while the sale of the land in dispute would not be a sale of Throop's improvements, it would be a sale of that with a view to the use and ownership of which those improvements were erected, and without which they would be comparatively valueless, and, if Throop be a "*bona fide* settler," would be in contravention of the spirit, if not the letter of the law.

The exception in the act of June 3, 1878, is in favor not of the "settler," but of the "*bona fide* settler." The question to be determined in this case, then, is, whether or not within the meaning of those terms as used in the act of June 3, 1878, Throop was a "*bona fide* settler." The settlement to be *bona fide* must be made with the purpose of making the tract a home, and while the act, in exempting from its operation lands claimed by a "*bona fide* settler," *ex vi termini* recognizes that there may be a *bona fide* settlement on lands of the character described therein—that is, lands chiefly valuable for timber and "unfit for ordinary agricultural purposes"—yet, for obvious reasons, such settlements should be closely scrutinized, and the fact, that the land is of such a character, might be a circumstance, taken in connection with the other facts of the case, shedding light upon the question of the *bona fides* of the settler.

There is no evidence as to the character of the forty acre tract upon which Throop built his house, and, as this is a part of his claim and the burden is upon the timber applicant to show the invalidity of the pre-emption claim, this land must be held for the purpose of this investigation, subject to pre-emption, and must be taken into consideration in determining the character of the entire tract claimed by Throop. As to the remaining one hundred and twenty acres of the tract, the testimony shows that from forty to forty-five acres was open land or covered by brush, and the balance was covered by timber. The timber was small and inaccessible and not of sufficient value to justify the expense of making it accessible.

Porter testifies that he was a "rancher" by occupation, and that his father owned a ranch adjoining the land, and that he had used the land in connection with the ranch for grazing cattle, the cattle going upon the timber as well as upon the open land; and upon the whole, the testimony leaves the question in doubt, whether the land was more valuable for timber or for grazing. Some of the open land had been cultivated and the proof was conflicting as to whether or not the timber land when cleared would be fit for ordinary agricultural purposes.

Under the rule as to the burden of evidence in such cases, I am of the opinion, that the proof as to the character of the land, taken in connection with that as to Throop's acts of settlement and improvement, above set forth, does not show that he is not a "*bona fide* settler," and does not establish such a failure on the part of Throop to comply in good faith with the requirements of the law as would justify the action of the local officers; and the decision of your office, holding Porter's applica-

tion subject to Throop's final proof, is accordingly affirmed. If Throop's final proof should be rejected, the question will then arise on Porter's application, whether under the act of June 3, 1873, purchase can be made of detached tracts of land. (See Land Office Report of 1866, p. 199; 13 C. L. O., 35).

REPAYMENT—CANCELED PRE-EMPTION ENTRY.

MINERVA A. WIDGER.

In the absence of fraud, repayment may be allowed where an entry is canceled for failure to comply with the law in the matter of residence.

Secretary Vilas to Commissioner Stockslager, May 19, 1888.

I have considered the appeal of Minerva A. Widger from your office decision of November 4, 1886, denying repayment of the purchase money paid on her canceled pre-emption cash entry for the SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, the S. $\frac{1}{2}$ of NE. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$, Sec. 5, T. 40 N., R. 4 E., Olympia land district, Washington Territory.

The said cash entry was reported by a special agent and a hearing was ordered and set for July 23, 1886. Upon that day the local officers and the special agent were engaged in the trial of another case, and the claimant was notified that her case would have to be continued to July 30th, to which she objected and went home. On the day to which the case was continued the special agent presented the testimony for the government, the claimant not appearing, and in view of that evidence showing non-compliance with the law, and claimant's default after due notice you held the entry for cancellation and, in the absence of appeal, canceled it November 2, 1886.

October 11, 1886, the local officers transmitted the application for the repayment of the purchase money and by letter of November 6, 1886 you rejected the application on the ground "that said entry was canceled by office letter "P." of November 2, 1886 for fraud."

Your letter of November 2, 1886 does *not* find fraud but cancels the entry upon the claimant's admissions that she did not comply with the law in respect to residence. While the testimony taken at the proof, and the affidavit made by the claimant in support of her application for repayment, show that she was only an occasional visitor to the land, yet she makes no attempt to conceal the insufficiency of her residence and all the circumstances seem to confirm her statement that she was told that she could comply with the requirements of the pre-emption law by making improvements upon the tract and occasionally visiting it. Failing to find from the record before me that the claimant has perpetrated any fraud upon the government, I therefore reverse your decision and direct the repayment of the purchase money paid by her.

FINAL PROOF—EQUITABLE ADJUDICATION.

WILLIS McDOWELL.

An entry may be referred to the Board of Equitable Adjudication where the testimony of the witnesses on final proof, through mistake, was submitted the day previous to that named in the notice, and it is shown that no one appeared to protest on the day designated for taking such proof.

Acting Secretary Muldrow to Commissioner Stockslager, May 19, 1888.

I have considered the appeal of Willis McDowell from your office decisions of June 26 and September 25, 1886, requiring new publication of notice with relation to his final proof on his pre-emption claim, embracing the SE. $\frac{1}{4}$ of Sec. 16, T. 119 N., R. 77 W., Huron, Dakota.

The record shows that appellant made pre-emption cash entry, No. 8857, for the tract April 16, 1884, and received final certificate. In his published notice of intention to make final proof, he stated that it would be made before the judge of probate in and for Potter county, Dakota, at Forest City, on March 29, 1884, and that the testimony of his witnesses would be taken before a notary public named, at Appomatax on March 28, 1884.

It appears that his own testimony was taken at the time and place and before the officer named in the notice, and that the testimony of his witnesses was taken at the place and before the officer named, but on the day preceding that named in the notice, to wit, on March 27th, instead of March 28th. It was because of this change of day in taking the testimony of witnesses that your office required that an alias notice be issued.

Claimant states under oath that the testimony of his witnesses was thus prematurely taken under a misapprehension of the facts, he thinking that the notice had named the 27th as the day for taking the testimony of his witnesses, and the 28th as the day fixed for taking his own testimony; that under this impression, he started to go to the office of the probate judge, where his own testimony was to be taken, so as to get there on the 28th, but was detained by floods, so that he did not arrive and present himself before the judge until the 29th of the month (March), when he, for the first time, became aware that he was on time before the judge, but that the testimony of his witnesses had been taken one day before the day named in the published notice. The notary, before whom his witnesses testified, swears that he also was under a misapprehension as to the date and that he for that reason took the testimony of claimant's witnesses on the 27th, instead of the 28th of March, the day advertised. He further states that he was at his office all day on the 28th, and that no one appeared to object to claimant's proof. No one appeared to object at the office of the probate judge, where the testimony of claimant was taken exactly in accordance with the advertised notice.

It seems clear, therefore, that the notice served every purpose for which it was intended. The proof and payment for the land were accepted by the local officers, no objection coming from any source.

No objection is made by your office as to the weight and character of the evidence offered in final proof, and upon an examination of the same it appears to me to be satisfactory.

In view of all the facts, and of the explanation made, it appearing that claimant has acted in good faith; that he has shown compliance with the law in the matters of settlement and improvement, and that no one will be wronged by allowing his entry, I am of the opinion that this is a case which may properly be referred to the Board of Equitable Adjudication for its action. Such reference will accordingly be made, and your office decision is modified accordingly.

SCHOOL LANDS—SURVEY—TIMBER LANDS.

O'DONALD v. THE STATE OF CALIFORNIA.

In closing a system of surveys progressing from west to east upon another system extending from a different meridian, it is necessary to depart from the rule laid down in sub-division 5 of section 2395 R. S. and in such case deduct deficiencies from the eastern range of sections.

Section 2276 of the Revised Statutes only establishes a unit or basis of measurement, and in States where two sections of land to each township are granted for school purposes, twice the amount specified in said section will be allowed for deficiencies in fractional townships.

Lands selected for educational purposes are expressly reserved from the operation of the timber land act of June 3, 1878.

Acting Secretary Muldrow to Commissioner Stockslager, May 19, 1888.

I have considered the case of Thomas O'Donald, Jr., v. The State of California, on appeal by O'Donald from the decision of your office of July 28, 1886, affirming the action of the local officers in rejecting his application to make timber land entry on the S. $\frac{1}{2}$ of NW. $\frac{1}{4}$ and W. $\frac{1}{2}$ of SW. $\frac{1}{4}$, Sec. 2, T. 14 N., R. 1 E., Humboldt district, California, for the reason that said land is embraced in school indemnity selection, No. 41, of said land district.

The selection was made September 29, 1884, and O'Donald's application to purchase was filed March 1, 1886. The first error assigned by the appellant is, that fractional township 9 N., range 8 E., for deficiencies in which the selection was made, was improperly surveyed, so as to show section thirty-six entirely wanting, and section sixteen as containing only 307.60 acres. The township was six miles from north to south, but a little less than three from east to west, and in the survey thereof the deficiency was deducted from the eastern instead of the western range of sections, so that the eastern tier of sections was numbered 4, 9, 16, 21, 28, and 33.

It is contended by the appellant, that the deficiency should have been deducted, as provided by sub-division 5 of section 2395, R. S., from the western range of sections, so that the eastern tier of sections would have been numbered 1, 12, 13, 24, 25 and 36. Upon the latter basis of survey, section thirty-six would have been in place, and the State would have had all the school land to which it was entitled; under the survey as made, section thirty-six was entirely wanting, and section sixteen contained only 307.60 acres, leaving a deficiency of 12.40 acres, if the fractional township was entitled to half a section, and of 332.40 acres, if it was entitled to an entire section.

I am of the opinion that the survey and numbering of the sections was correct, as it appears, as stated in the decision of your office, that the "survey fell under the rule governing where one system of surveys is being closed from *west to east* upon another extending from a different meridian," in which case it becomes necessary to depart from the rule laid down in sub-division 5 of section 2395, R. S. (See Instructions of Commissioner to surveyors general, of May 3, 1881, p. 18). In the case of J. R. Glover (2 C. L. L., 1419), cited by appellant, the survey was progressing from *east to west*, and there was consequently no necessity for a departure from the statutory rule.

In the next place, the appellant insists that, admitting the survey to be correct, the amount of the deficiency is to be estimated, under section 2276 of the Revised Statutes, on the basis of an allowance of *one* instead of *two* sections to a township, or fractional township, containing more than three-quarters of an entire township. On the former basis, the deficiency, as above stated, would be 12.40 acres, and on the latter, 332.40 acres.

At the time the act of May 20, 1826 (4 Stat., 179), upon which section 2276 of the Revised Statutes is founded, was passed, only one section of land, the sixteenth, was allowed for each township for school purposes, and the act granting the State of California two sections, the sixteenth and thirty-sixth, was not passed until March 3, 1853 (10 Stat., 244). The act of February 26, 1859 (11 Stat., 385), of which section 2275 of the Revised Statutes is a revision, provides, among other things, that:

Lands are also hereby appropriated to compensate deficiencies for school purposes, where said sections 16 or 36 are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever: *Provided*, That the lands by this section appropriated, shall be selected and appropriated in accordance with the principles of adjustment and the provisions of the act of Congress of May 20, 1826.

This act, it will be noticed, appropriates land for deficiencies where one or both of sections sixteen and thirty-six are wanting, and the above proviso, that the lands so appropriated shall be selected in accordance with the principles of adjustment of the act of 1826, is embraced in the first clause of section 2276 of the Revised Statutes, to wit: "The lands

appropriated by the preceding section shall be selected in accordance with the following principles of adjustment. . . . "

The act of 1859 is substantially re-enacted by the Revised Statutes, and all its provisions, exclusive of said proviso, are embodied in section 2275, and the proviso is embraced in section 2276. These statutes refer to each other, and they and the laws relating to school grants to the several States are in *pari materia*, and "Where there are different statutes in *pari materia*, though made at different times, or even expired, and not referring to each other, they shall be taken and construed together as one system, and as explanatory of each other." (Sedg. Stat. & Const. L., 210).

Section 2276 (act of May 20, 1826,) thus construed, only establishes a unit or basis of measurement, and in States like California, where two sections of land to each township are granted for school purposes, twice the amount specified in section 2276 will be allowed in cases of deficiency of school lands in fractional townships. Congress can not be held to have intended to discriminate in favor of entire as against fractional townships by giving the former twice as much in proportion as the latter.

This is the practical construction given this statute in the circulars to land offices in California, dated August 21, 1862, the object of which as stated therein, was "to secure uniformity of action in making selections for school purposes" under the acts of Congress above cited, and in which circular, the local officers are instructed, that "For each fractional township containing a greater quantity of public land than three-quarters of an entire township the State shall be entitled to two sections of twelve hundred and eighty acres," and in the same proportion for the smaller fractions mentioned in section 2276, Revised Statutes. (1 C. L. L., 437.)

In the third place it is claimed by appellant that the lands in controversy are chiefly valuable for timber, and subject to sale as timber land under the act of June 3, 1878 (20 Stat., 89), at \$2.50 per acre, and are therefore "double minimum" lands, and not subject to school indemnity selection, and that a hearing should have been ordered to determine the character of the lands.

It is expressly decided in the case of the State of California v. Smith (5 L. D., 543), that the State of California is not authorized to select "double minimum" in lieu of school lands deficient in fractional townships.

In the decision of your office it is held that the term "double minimum applies only to lands within the limits of certain grants by the express provisions of which the specific sections increased in price may be designated and known within defined limits,"—in other words, the alternate sections reserved to the United States under grants of land to railroads, military roads and other works of internal improvement, to aid in the construction thereof—and that lands purchasable under the

act of June 3, 1878, as timber lands, are not "double-minimum", and hence, are subject to school indemnity selection.

In my opinion, however, it is immaterial in this case, whether or not lands within the purview of the act of June 3, 1878, fall strictly under the technical classification of lands designated in the law as "double minimum," as it is provided in the first section of said act,

That nothing herein contained shall authorize the sale of any lands selected by the said States (California and others) under any law of the United States donating lands for internal improvements, education, or other purposes.

This is an express reservation from the operation of the act of lands selected by the State of California, and the other States mentioned in the act, under section 2276, Rev. Stat., for educational purposes.

The conclusion attained by your office is correct and the decision is accordingly affirmed.

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SCHOOL INDEMNITY SELECTION—DEFECTIVE BASIS.

BARCLAY ET AL. v. THE STATE OF CALIFORNIA.

A school indemnity selection made upon a basis defective in part, is invalid as to the entire selection.

A defect of such character in a selection may be cured by amendment or relinquishment, but the right of the State in such case takes effect only from the date of the amendment or relinquishment.

Acting Secretary Muldrow to Commissioner Stockslager, May 19, 1888.

The State of California, upon an amended application filed April 14, 1884, made indemnity school selection of certain tracts of land to compensate for deficiencies in townships fractional in quantity, upon the following basis.

Fractional Township 2 N., 1 W., H. M.,	80 acres.
" " " 2 S., 8 E., H. M.,	80 acres.
" " " 11 N., 8 E., H. M.,	160 acres.

Total 320 acres.

On January 5, 1885, Henry Barclay made application to purchase under the timber and stone act of June 3, 1878, (20 Stat., 89) the W. $\frac{1}{2}$ SE. $\frac{1}{4}$ and S. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 32, T. 18 N., R. 1 E., H. M., and John McLeod made application under said act to purchase the SW. $\frac{1}{4}$ of said section. These several tracts are covered by the State indemnity school selections made upon the above stated basis, and for this reason the said applications were rejected by the local officers.

Upon appeal from said rejection your office under date of March 23, 1887, reversed the decision of the local officers and held said selections for cancellation and allowed the timber applications to proceed to entry

upon the ground that a school indemnity selection invalid in part is invalid as a whole on the face of the record.

Of the deficiencies used on the above basis, the eighty acres in township 2 south existed at the date of the selection and hence was a proper basis to that extent.

The one hundred and sixty acres in township 11 N., 8 E., had been previously used as the basis for another selection, but said selection was canceled December 10, 1884, two days prior to the use of the same one hundred and sixty acres for the present selection, and in the absence of appeal the said basis was, by the cancellation of December 10, 1884, free at the date of the present selection and a proper basis for another selection, although the sixty days allowed for appeal had not expired, said judgment of cancellation being a valid judgment, binding from its date and subject to be vacated only at the instance of the State upon appeal. See *State of California* (6 L. D., 403); *John H. Reed* (ibid, 563); *Durand v. Martin* (120 U. S., 366).

Therefore the only defect in the basis is as to the eighty acres in township 2 N., R. 1 W.

As to this part of the basis 43.66 acres of the eighty acres was, at the date of this selection being also used as the basis of another selection, to wit, in list No. 33, and for this reason the entire selection was rejected.

Since the application of Barclay and McLeod were allowed by you, and while this case was pending before the Department on appeal, the State abandoned and relinquished the selection made per list 33, and filed a certified copy of said relinquishment dated at office of surveyor-general, State of California, November 12, 1887. The State claims by virtue of this relinquishment to "cure all possible objection to selection No. 1230". (The selection now under controversy).

The controlling questions presented in this case are (1) whether a selection made upon a basis defective in part is invalid as to the entire selection, or whether said selection is invalid only to the extent that the basis may be found to be invalid; and (2) whether said defect can be cured by amendment or relinquishment so as to defeat the rights of adverse claimants whose claims were initiated prior to such amendment or relinquishment.

The Department held in the case of *Hugh McKenzie* decided February 10, 1888 (6 L. D., 630), that where the basis is valid and free from defect a selection made thereon is not invalid as to the entire selection although part of the lands selected may not be subject to selection, but that the selection may stand as to that part of the tract that was subject and the State may select other land upon said basis in lieu of that part of the selection which is found not to be subject, notwithstanding the subsequent applications of parties to make entry of parts of the selection that were subject to selection at the date of the application.

This ruling was based upon the principle that the State being enti-

tled to select a quantity of land equal to the quantity contained in the basis, there can be no reason for holding a selection made thereon illegal in its entirety because a part of said selection might not be subject. This principle controls in all cases where the qualification or right of the party to enter is established, and the only question to be determined is as to the character of the land sought to be entered. In all such cases the application to enter will not be rejected because part of the tract may not be subject to entry, but will be allowed as to the part subject and rejected as to the part not subject. This rule applies with equal force in State school selections.

But the rule is different where the invalidity or irregularity of the application or entry goes to the qualification or right of the entryman to make entry, not as to the particular tract but as to any tract. This rule applies with greater force in the case of indemnity school selections made to supply deficiencies in fractional townships. In such cases the basis is made up of several fractions which constitute a whole, and a defect as to any part of said basis renders the entire basis defective because such basis, considered in its entirety is what constitutes the right of the State to make selection therefor and if defective in part it must of necessity be defective as a whole.

The correctness of this principle is illustrated by considering what would be the effect if applications were made for each part of said selection. It could not be determined what part of the selection was covered by the defective part of the basis, and, hence, it could not be determined which application, or applications, should be allowed to stand and which rejected.

Nor do I think that the rights of applicants to enter any part of said selection initiated after a selection made upon a defective and illegal basis can be affected by amendment or relinquishment with a view to curing said defect.

There can be no question that the State has the right, by amendment or relinquishment to cure said defect, but its right thereunder would date from said amendment or relinquishment.

In this case the State upon a basis of three hundred and twenty acres was holding in reservation about three hundred and sixty, about forty acres of said basis being used to hold in reservation under selection double the quantity of such basis.

To allow such practice to prevail would cause much confusion in the records of your office, and allow the State an undue advantage over the settler, because, if it may hold double the quantity of land in reservation under selection as to part of the basis it may, with as much propriety, hold double the quantity in reservation for the entire basis.

Your decision is affirmed. The applications of Barclay and McLeod will be received and the State selection will be canceled, with the right to make another selection upon said basis in lieu of tract selected.

*SCHOOL INDEMNITY—SELECTION IN EXCESS OF BASIS.***MELVIN ET AL. v. THE STATE OF CALIFORNIA.**

A selection is not invalid, under the circular of July 23, 1835, because slightly in excess of the basis upon which it is made.

The circular of July 29, 1837, cited and approved.

A misdescription in the basis, resulting from clerical error, will not invalidate the selection, where such error was without prejudice to the rights of others, and no one was misled thereby.

JANUARY 5, 1888.

The COMMISSIONER OF THE GENERAL LAND OFFICE:

SIR:—On the 3d day of January, 1835, there were presented to the local officers at Humboldt, California, the following applications to make entry under the timber and stone law of June 3, 1878 (20 Stat., 89): Alfred Melvin—S. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of Sec. 30, and S. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of Sec. 29; George L. Hays—N. $\frac{1}{2}$ of SW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ of NW $\frac{1}{4}$ of Sec. 29, and NE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Sec. 30; George W. Chandler—Lots 7, 11, and 12, Sec. 30, and Lot 2, Sec. 31, all in T. 18 N., R. 1 E., H. M.

These applications were rejected by the local officers because the tracts were "covered by State indemnity school selection R. and R. No. 39, filed April 14, 1884, and amended application made by the State and filed in this office December 12, 1884."

From this rejection an appeal was taken by the timber applicants, and on the 23d of March, 1887, your office reversed the decision of the local officers and allowed said applications. Appeal from this decision brings the case here.

The above tracts are embraced in the following two school indemnity selections, made December 12, 1884, per list No. 50, "amending R. & R. No. 39, filed April 14, 1884"; No. 1231—N. $\frac{1}{2}$ of SW. $\frac{1}{4}$, NW. $\frac{1}{4}$, and NW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Sec. 29, and NE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Sec. 30, T. and R. aforesaid, based on:

Fractional Township 15	N. 1 W.	H. M.,	31.61 acres.
"	" 9 " 8 E.	" "	92.40 "
"	" 5 S. 7 E.	" "	19.84 "
"	" 8 N. 8 E.	" "	71.28 "
"	" 3 " 8 "	" "	33.96 "
"	" 7 " 8 "	" "	70.91 "
Total 320.00 "			

and No. 1234—S. $\frac{1}{2}$ of NE. $\frac{1}{4}$, N. $\frac{1}{2}$ of SE. $\frac{1}{4}$, and Lots 7, 11 and 12, Sec. 30, and Lot 2, Sec. 31, T. 18 N., R. 1 E., H. M., based on a township described in the amendatory list as fractional township 14 N., R. 8, M. D. M., 320 acres.

Your office held the former selection defective, and hence, for cancellation, because the deficit in T. 5 S., R. 7 E., is only 10.25 acres instead of "19.84" acres, as stated in said list.

I am of the opinion, however, that the cancellation of this selection would not be proper under the circumstances. The actual loss for which indemnity is sought by this selection is 310.41 acres, and the selection is 320 acres, making an excess in selection of 9.59 acres. This excess under the circular of July 23, 1885 (4 L. D., 79), should not prove fatal to the entire selection. The following is the rule therein laid down:

Where it occurs that a fraction in quantity of less than forty acres remains as the basis for a selection in a fractional township, or a section or a part of a section lost to the State, a specific sub-division, containing a quantity equal to the basis *or a little more or a little less*, may be selected and the State will be credited in the final adjustment of the grant with the balance in her favor, if any such balance should then be found to exist.

Applying this rule to the case at bar, selection No. 1231 will be allowed to stand, and the applications of Melvin as to the S. $\frac{1}{2}$ of NW. $\frac{1}{4}$, said section 29, must be rejected. Likewise the application of Hays must be rejected because all the land applied for by him is embraced in said selection No. 1231.

My attention has been called to a subsequent circular letter from your office, dated July 29, 1887, upon this subject, which reads as follows:

Hereafter on presentation of applications to select school indemnity it will be insisted on that the areas of the selected tracts and their bases must be equal, and the selections must be separate and distinct, so that action thereon may be taken separately. For instance, the total deficiency in a school section, or in the township may be 131.00 acres. In lieu of this, 120 acres may be selected, and there will remain eleven acres to be satisfied in another selection. These fractions may be used in selections of larger tracts by adding a sufficient number of them together, so that the area of the selected tract is nearly reached, and then a portion of a deficiency should be added to make up the exact quantities selected. Care should be taken not to divide deficiencies of aliquot parts of technical sections, such as quantities of 40 acres, 80 acres, etc., so long as fractions of less than 40 acres may be so used.

A careful and complete record of deficiencies satisfied by selections should be made on your tract books in the places set apart for the 16th and 36th sections, giving the exact areas of the losses or deficits used, and referring to the tracts selected in lieu thereof by section, township and range.

This circular rules somewhat more strictly on cases of this kind than the one dated July 23, 1885 (*supra*). I am of opinion, however, that the modification mentioned is in the right direction, and that a strict adherence to the rule laid down in the subsequent circular will result in practical advantages to all parties concerned, as I am informed by you it has already done.

Your office held selection No. 1234 invalid for want of proper basis. The lands included in this basis, as before stated, are described as "fractional T. 14 N., R. 8 E., 'M. D. M.'" What was intended is clear beyond all question to have been the same township "H. M." That was the description given of the land in the original selection made per list No. 39, of which list No. 50 was amendatory. The deficit in said township Humboldt Meridian corresponds to the deficit used as a basis for the selection in question. There were no lands in the Humboldt district described as north and east of Mount Diablo Meridian; and as the law prescribes that in making indemnity school selections the *basis* and the *selection* must be in the *same land district*, it is impossible to come to any other conclusion than that the lands intended to be described as a basis for said selection No. 1234 were in T. 14 N., R. 8 E., H. M. The error in misdescription was purely a clerical error, overlooked by the State agent and by the register and receiver when they accepted the selection, and no one was injured or misled by such error. In the absence of injury to any one, it will be held that the said selection No. 1234 was not fatally defective; and, following the well known rule that the law seeks substance and not form, that said selection will be approved.

The contention of the State that the selection shall be held to date from April 14, 1884, the date of the original list No. 39, can not be maintained. That selection was rejected by the Commissioner of the General Land Office, and no appeal was taken from such rejection; but on the contrary an amendatory list No. 50, was filed December 12, 1884, and it is from this latter date the selection must date. *California v. Hailes* (1 C. L. L., 324), *Selby et al. v. State of California* (3 C. L. O., 4).

Selection No. 1234 having been approved, the application of Chandler is rejected and that of Melvin for the S. $\frac{1}{2}$ of NE. $\frac{1}{4}$ said section 30 is also rejected.

The decision appealed from is reversed, and the papers in the case are herewith returned.

Very respectfully,

Secretary.

FEBRUARY, 10, 1888.

This case was fully considered by Secretary Lamar before he left the Department, and after hearing argument he directed the foregoing opinion to be prepared for signature, and I am informed that he intended to sign it, and thought he had done so. I have carefully examined it, believe it to be correct, and now adopt it.

Very respectfully,

H. L. MULBROW,
Acting Secretary.

PRACTICE—HEARING ON THE REPORT OF SPECIAL AGENT.

HENRY W. FIEDLER,

The Department will not control the discretion of the Commissioner in ordering a hearing on the report of a special agent, where the facts as set forth in such report are denied.

Secretary Vilas to Acting Commissioner Stockslager, March 8, 1888.

You held for cancellation the pre-emption entry of Leah Fiedler, for the SE. $\frac{1}{4}$, Sec. 3, T. 23, R. 22 W., Larned, Kansas, upon the report of Special Agent Clark S. Rowe. From this action Henry W. Fiedler, transferee, appealed.

You treated said appeal as an application for a hearing under circular of instructions of July 6, 1886 (5 L. D., 149). Thereupon a hearing was ordered and you declined to transmit said appeal to this Department. Fiedler makes application to have the record certified to the Department under rules 83 and 84 of Rules of Practice, alleging that "the report of special agent Clark S. Rowe, upon which said entry was suspended, was untrue."

A party is entitled to the right of appeal from a decision of your office, holding an entry for cancellation upon the report of a special agent, notwithstanding a hearing has been ordered, provided he does not controvert the facts alleged in the report of the special agent, but whenever such facts are denied the Department will not control your discretion in ordering a hearing in such cases.

The application is denied.

FINAL PROOF—PUBLICATION OF NOTICE.

NANCY E. ADAMS.

New publication of notice required where the published notice of intention to submit final proof, through mistake of the register, erroneously described the land.

Acting Secretary Muldrow to Commissioner Stockslager, May 8, 1888.

Nancy E. Adams filed declaratory statement for the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, lot 7 and the S. $\frac{1}{2}$ of lot 6, Sec. 18, T. 12 S., R. 2 W., Los Angeles land district, California, October 6th, alleging settlement July 5, 1883. This tract contains 160 acres.

December 11, 1885, Mrs. Adams advertised her intention to make proof for the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, the E. $\frac{1}{2}$ of SW. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, Sec. 18, T. 12 S., R. 2 W., on February 2, 1886.

The proof was made at the time and before the officers designated, the claimant's testimony being taken by J. M. Dodge, county clerk of San Diego county, and the testimony of the witnesses by George N. Hitchcock, notary public of said county.

The proof shows the claimant to be a qualified pre-empter with improvements consisting of a house, well, shed, corral and fifty acres of breaking, valued at \$250. Residence is said to have been continuous since July 5, 1883.

May 18, 1886, the local officers rejected the proof on account of the discrepancy in the description between the land as described in the declaratory statement and the land described in the notice and proof, and because of want of contiguity of the tracts as appearing in said notice and proof.

From said decision the claimant appealed claiming that she is not responsible for the error, which, she alleges, is in fact immaterial, the published description embracing the land filed for and "as long as the tract between said lot 6 and the township line to the west remains unsurveyed, the printed description can apply to no other land whatever."

In his letter of May 25, 1886, the register states :

The error in furnishing the wrong description for publication by this office was made by inadvertently accepting that given by attorney for claimant in her notice of intention to make proof, without verifying it by reference to the tract book.

Your decision of June 28, 1886 held "that the tract described in the published notice and proof is not that filed for, is not contiguous, and presumably is not that sought to be entered" and that new notice must be published and new proof made.

I do not think the description of the land contained in the notice of publication and in the proof was sufficiently accurate; but you are in error in holding that it is not contiguous and is not that sought to be entered. I see nothing in the record to indicate that the error in description was not an honest one caused by the mistake of the register or that the claimant was endeavoring to secure any land not covered by her filing. You will therefore direct the local office to notify the applicant that she will be required to make proper publication of notice, and after the expiration of said notice, if no objection is filed, the proof made February 2, 1886, if otherwise satisfactory, may be accepted. Case of Forest M. Crosthwaite (4 L. D., 406).

Your decision is modified accordingly.

MINING CLAIM—MILL SITE.

CYPRUS MILL SITE.

Land not improved or occupied for mining or milling purposes, may not be appropriated as a mill site, for the purpose of securing the use of the water thereon.

Acting Secretary Muldrow to Commissioner Stockslager, May 19, 1888.

I have considered the appeal of the Frisco Mining and Smelting Company from the decision of your office, dated October 30, 1886, holding for cancellation application No. 1075, for patent to the Cyprus Mill-site

claim, described as Lot No. 43, in Bradshaw mining district, Beaver county, Utah.

The record shows that upon the protest of T. J. Chase and four others, alleging that the land was not of the character subject to entry under said application, a hearing was had before the local land officers, who decided that the allegations of said protestants were not sustained, and that the entry ought to be allowed. On appeal, your office held, upon the authority of the decision of my predecessor, Secretary Lamar, in the case of Charles Lennig (5 L. D., 190) that the application must be held for cancellation for the reason that "the claim is not applied for in connection with a lode, nor is it shown or even alleged that a quartz mine or reduction works exist thereon."

Counsel for the company insists that under the proper construction of section 2337, Revised Statutes, it is not necessary that the applicant should have upon the mill-site "a quartz mill or reduction works" if it be shown that the applicant is the proprietor of a vein or lode, and that the mill-site is used and occupied for milling and mining purposes in connection with some vein or lode; that it is not essential that the application for a patent to a mill-site should be included in an application for a patent to a vein or lode to give the owner of the vein or lode a right to the mill-site; that there was a spring for said mill-site which "was occupied used and improved by the company for the purpose of supplying water to the miners and teamsters employed by it in working its mines and hauling the ores taken therefrom, (there being no water elsewhere within a radius of several miles) and some of the houses and stables occupied and used by the employees were located upon the mill-site and others in the immediate vicinity thereof."

By section 2337, Revised Statutes, it is provided that,

Where non-mineral land, not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such non-adjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location hereafter made of such non-adjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this chapter for the superficies of the lode. The owner of a quartz mill or reduction works not owning a mine in connection therewith, may also receive a patent for his mill-site, as provided in this section.

In the case of Charles Lennig (*supra*) this Department held that said section 2337 contemplated the actual use or occupation by improvements or otherwise, for mining or milling purposes of the land; that under the second clause of said act the right to a patent of a mill-site depends upon the existence on the land of a quartz mill or reduction works; that under the first clause of said section "it is not necessary that the land be actually a mill-site; that the use or occupation of the land for mining or milling purposes is the only pre-requisite to a

patent; that the use of the land "for depositing 'tailings' or storing ores, or for shops or houses for his workmen, or for collecting water to run his quartz mill, ... would be using it for mining or milling purposes;" that the occupation for mining or milling purposes as distinguished from use, must be more than mere naked possession, and that such occupation must be shown by "outward and visible signs of the applicant's good faith;" also that where the applicant is not actually using the land "he must show such an occupation by improvements or otherwise as evidences an intended use of the tract in good faith for mining or milling purposes."

In the Lennig case (*supra*) it appeared that the land applied for lay on the banks of a creek and also contained springs which made it suitable for a mill-site; that the water was used in running a "smelter located on the Eureka mine" two miles away to which it was conveyed in pipes, and it was held by this Department that the land was not used for "any purpose in connection with mining or milling," and that "the use of water is not a use of the land."

In the case at bar it appears that there is upon the land applied for a spring of water that supplies the inhabitants of the town of Bradshaw, and it is claimed by the company that it is necessary for the company to have the use of the water in said spring for the employees engaged in mining its mineral claims; and for that reason patent should issue for the land as a mill-site. This contention can not be maintained. The application is not made in connection with any vein or lode claim, and the certificate of the United States surveyor general dated December 1, 1882, and filed with the field notes of survey of said claim makes no mention of the value of the improvements thereon. It is true that the United States deputy mineral surveyor who made the survey of said mill-site claim, certifies that "the value of the labor performed and improvements made upon the Cyprus Lode in connection with which said mill-site has been located, ... exceeds one thousand dollars" and that "said improvements consist of a tunnel thirty feet long, an incline sixty feet long, three wagon roads cut into side of hill, and two trails."

The certificate of the United States surveyor general, dated February 23, 1883, states that the labor done and improvements made on the ground of the Cyprus Mill-site, Lot No. 43, exceeds \$500 in value, "which improvements, according to the certificate of E. Buettner, United States deputy mineral surveyor, consist of a road blasted in side of hill, improving spring by digging out and encasing with masonry; placing two hand power pumps with hose, placing horse power pump." This certificate does not show that the improvements on said claim were made for mining or milling purposes. The encasing of the spring with masonry, and the placing of said pumps therein, may facilitate the procuring of water from the spring. But we have seen that under the decision of the Department the use of the water is not the use of

the land as contemplated in said section. If the company be entitled to the exclusive use of the water of said spring, their rights are protected under the provisions of section 2339, Revised Statutes, and not under section 2337, unless they show full compliance with the requirements of said last named section.

It is not intended to rule that in no case can an owner of a vein or lode claim make entry of a mill-site under said section unless the claim for the same shall be embraced in the application for a vein or lode.

In the case at bar, however, I must hold that upon the record as presented, said application was properly rejected.

Said decision is accordingly affirmed.

SETTLEMENT ON SEGREGATED LAND.

TARR *v.* BURNHAM.

While as against a railroad grant, or the government, no rights could be acquired by settlement on granted land, yet as between two settlers on such land priority of settlement may be considered, on the forfeiture of the grant and restoration of the land to the public domain.

Secretary Vilas to Commissioner Stockslager, May 2, 1888.

The case of Pinckney Tarr *v.* Frank T. Burnham, involves the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 25, T. 15 S., R. 2 E., Los Angeles land district, California, and is brought here on appeal by Tarr from the decision of your office, under date of September 13, 1886, adverse to him.

In addition to the facts stated in your office decision of the date aforesaid, the record shows, that prior to the date of the act of Congress declaring the forfeiture of the grant to the Texas Pacific Railroad Company as therein stated, the said Burnham made application at the local office to file declaratory statement for the tract mentioned in his filing made June 8, 1885, as stated, but the same was rejected because the land was within the limits of the said railroad grant; that said Tarr applied to make final proof under his declaratory statement filed March 20, 1884, as stated in your said office decision and his said application was rejected for the same reason as above mentioned; whereupon the said filing of Tarr was suspended as having been inadvertently allowed. That from such rejections and suspension, the parties hereto respectively appealed, but pending said appeals, and before action thereon, the forfeiture act above referred to was passed and approved, and thereupon said appeals were dismissed. That the parties hereto respectively, upon being notified of the passage of said forfeiture act, made the filing and entry mentioned in your said office letter.

It also appears that on the 26th of February, 1886, the parties by their attorneys, stipulated in writing, that:

In view of the fact that both applications of the parties hereto were pending in the general land office before the railroad land was declared

forfeited, and also to avoid the trouble and delay of taking additional testimony on behalf of said Tarr to establish the fact that the land in controversy was excepted from the railroad grant by reason of occupation by a pre-emption claimant—It is hereby stipulated that no question shall be made or raised herein as to the priority of the filings of said parties.

By said stipulation, which appears to have been duly signed by the attorneys for the parties and filed in the papers of the case on the day of its date, any question of priority of filing, which might otherwise have arisen in this case, is eliminated from the controversy. The only question left for consideration, therefore, is as to the prior rights and superior equities of the parties upon the question of settlement and improvement of the tract in contest.

The point is made by the attorney for Tarr, that inasmuch as the land was within the limits of the withdrawal for the benefit of said Texas Pacific Railroad Company, and therefore not subject to entry under the general land laws of the United States at the date of both settlements thereon, the effect must be to give to both parties equal rights so far as any question of priority of settlement is concerned. Conceding that prior to the act of Congress declaring the forfeiture of the lands granted to said Texas Pacific Railroad Company, and restoring them to the public domain, neither of the parties could acquire any right by virtue of settlement as against the said railroad company, or the United States, yet it does not follow that as between the parties themselves, the question of prior settlement can not properly be considered in determining their respective rights touching the tract of land in contest. (*Geer v. Farrington*, 4 L. D., 410).

An examination of the whole record shows that the facts, as far as stated in your said office decision, are substantially correct, and after a careful consideration of the same, together with the foregoing, I concur in said decision, and the same is hereby confirmed.

PRE-EMPTION FINAL PROOF—EQUITABLE ADJUDICATION.

REBECCA C. WILLIAMS.

An entry may be referred to the Board of Equitable Adjudication, where the non-mineral, and new final affidavit were executed outside of the Territory in which the land was situated; it appearing that the claimant had shown due compliance with the law, and was not chargeable with negligence in the matter of submitting final proof.

Secretary Vilas to Commissioner Stockslager, May 22, 1888.

On December 8, 1883, Rebecca C. Williams made pre-emption proof for the NW. fractional quarter T. 137 N., R. 61 W., Fargo, Dakota, before the clerk of the district court for Barnes county, in said Territory, and on the 28th of the same month the proof was approved by the local officers and her entry allowed.

By letter of September 23, 1885, your office directed the local officers

to call on her to furnish a new pre-emption affidavit covering the date of entry, and also a non-mineral affidavit. By letter of April 8, 1886 the local officers transmitted the required affidavits, dated November 7, 1885, and made before the clerk of the common pleas court of Bedford county Pennsylvania. Accompanying these affidavits was another, made by claimant and duly corroborated, stating that in 1883 she went to Dakota with the intention of taking up her residence there, and took up said claim for her own use and benefit exclusively; that she left an aged father and mother in Pennsylvania, who subsequent to the date of said cash entry insisted on her returning to them; that in obedience to their wishes she returned to Pennsylvania and is now living with her parents; that she is still the owner of said claim, has paid taxes on it, and kept it under cultivation; and that the care of her parents and her poverty prevent her going to Dakota to make said affidavits.

Your office examined these affidavits and by letter of July 2, 1887, rejected them, and directed that claimant must furnish proper affidavits made in the district and territory in which the land is situated. Claimant appealed.

The act of June 9, 1880, provides that the final pre-emption affidavit "may be made before the clerk of the county court or of any court of record of the State or district and Territory in which the lands are situated". Claimant availed herself of this provision and made said affidavit with her proof before the clerk of the court of Barnes county. The delay in the allowance of the entry is not attributed to her by your office, nor do the papers indicate that it was caused by her. Had the demand for new final pre-emption affidavit been made on the date of entry she could have complied with it, as she was then still living in Dakota. While the proof shows that the land is agricultural and not mineral, it does not appear that the usual non-mineral affidavit was furnished with the proof. This does not appear to have been wholly chargeable to her, as the local officers who examined the proof pronounced it complete and approved it. From this recital it seems that claimant has substantially complied with the law and the case should be referred to the Board of Equitable Adjudication.

Said decision is accordingly reversed.

MINING CLAIM—EXPENDITURE.

ALICE EDITH LODE.

Whether work done on a road leading to a claim, but not within the exterior lines thereof, can be properly accepted or not, in proof of the required expenditure, proof of such work cannot be allowed where the road is for the joint benefit of several claims.

Secretary Vilas to Commissioner Stockslager, May 22, 1888.

I have considered the appeal of the Dolores Valley Mining Company, from your decision of May 13, 1886, holding that the evidence of im-

provements upon the "Alice Edith" lode claim, mineral entry No. 177, is insufficient.

The record shows that the entry was made by said company December 27, 1885, at the Durango land office, in the State of Colorado.

On March 18, 1885, your office examined the papers pertaining to said entry and found that by report of the deputy surveyor the improvements are shown to consist of a discovery adit, fifteen feet long, with a shaft thirteen and one half feet, and drift; also a wagon road partially built from Rico to said claim; and that the amount expended on said road is \$300.

It not appearing that any part of said wagon road is situated within the boundary lines of the claim, your office held that the certificate from the surveyor general's office did not show that five hundred dollars had been expended upon the claim as required by law; that the amount expended upon the wagon road could not be included in calculating the expenditure required by the statute (Section 2325, Revised Statutes) unless it be shown that the amount so included was expended on the road and within the exterior boundaries of the claim.

So holding, and finding that, leaving out of consideration the expenditure made upon the road, there had not been expended the amount of five hundred dollars, your office by its letter of March 18, 1885, required the claimant to furnish the certificate of the surveyor general showing that the necessary expenditure had been made upon the claim.

In response to this requirement the joint affidavit of C. O. French, general manager, and William Davidson, agent and superintendent of said company, was filed in the local office and forwarded to your office with a view to showing that the work done and the money expended upon the wagon road although not within the exterior boundaries of the claim, was for the development of the mine, and therefore met the requirement of the law relative to expenditure.

Said affidavit sets out that the Dolores Valley Mining Company, in the early part of 1881, became the owner of a group of lode mining claims situated contiguous to each other at the base of Telescope Mountain in the county of Dolores; that said company at this time became the owner of a second group of lode claims contiguous to each other, near the summit of said mountain; that the lode claim in question is in the last-mentioned group; that the company devised and put into operation a system of improvements for the development and working of all the mines in both groups, which system included the excavation of a tunnel three thousand feet in length, so laid and constructed as to intersect both groups of mines or claims; that the excavation of said tunnel, as well as the successful operation of the mines, rendered necessary the wagon road from the mouth of said tunnel to Rico, a distance of one and a quarter miles.

Your decision of May 13, 1886, holds that said joint affidavit made and filed as above indicated, does not meet the requirements of your

office letter of March 18, 1885, and that the entry can not be approved upon the present showing. You, therefore, there being no adverse claim, allowed claimant sixty days from notice of your decision within which to furnish the evidence required—namely: The certificate of the surveyor general that five hundred dollars worth of labor has been expended or improvements made upon the claim by the company or its grantors.

From this the company appeals, and contends that it has shown compliance with the law in the matter of improvement, and that the certificate already on file from the office of the surveyor general should be accepted as proof of that fact, especially in the light of the explanation made by the joint affidavit of French and Davidson, the manager and superintendent respectively of the company.

The sole question presented is whether the labor and money expended in making the wagon road can be included in calculating the expenditure upon the Alice Edith lode claim, no part of said road being within the exterior lines of said claim.

Without, at this time, passing upon the question as to whether work done on a road leading to a claim not on it, that is, not being within the exterior lines, can, under the law, properly be credited as a part of the five hundred dollars expenditure required by law upon the claim, I am of the opinion that the entry ought not to be approved upon the record as it now is.

From the statement made in the affidavits above referred to it seems clear that the expenditure of \$300 upon the road was not for the benefit of the Alice Edith lode claim exclusively, but that it was a part of the system of improvement adopted in the course of developing the two groups of mines or claims herein mentioned. Such being the fact, it must be held that, even if it were to be conceded that the making of a road outside the exterior boundaries of a claim but leading to it could be treated as a part of the improvement and development of the claim, (which is not done herein) nevertheless the expenditure on the road in question could not be credited to the one claim here under consideration, since to do so would be to credit this claim with work done and expenditure made in part for other claims or lodes.

For this reason your decision is affirmed.

AUTHORITY OF RECEIVER—PAYMENT—OFFICIAL BOND.

MATTHIESSEN AND WARD.

A payment accepted by the receiver, in advance of the time when the local office is ready to act upon an application and allow entry thereunder, is not in pursuance of any duty enjoined by law; and a failure to account for such money, in the event that the application is refused, is not a default as to any obligation due the government, and the sureties of the receiver would not be liable therefor.

By a payment thus made the applicant constitutes the receiver his agent to pay the money to the government if the application is allowed, and if the application is rejected the receiver is individually liable for repayment, and not the government.

Secretary Vilas to Commissioner Stockslager, May 22, 1888.

On March 31, 1886, Messrs. Abbett and Fuller, Attorneys for Matthiessen and Ward, filed in your office an application alleging that H. Carpenter, late receiver at the Eureka, Nevada Land Office, accepted a certain amount of money from said Matthiessen and Ward upon their application to purchase the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 33, T. 8 N., R. 50 E., Mt. Diablo meridian; that said Carpenter is no longer in office and that he has failed to pay to appellant said sum of money. They pray that the accounts of the said Carpenter as receiver be not passed until said money has been turned over by him and that his bondsman be held liable for the amount.

In passing upon said application you say :

Moneys are not payable to a receiver of public moneys until an entry has been allowed by the register and a certificate given. Any moneys placed in the hands of a receiver, or sent to him, to be afterwards applied to any entry, are not moneys lawfully paid to the receiver for which the United States is responsible, but are simply individual deposits in the nature of a personal trust. Such moneys are not received officially, because not authorized to be received. They can be received by the receiver only in his personal capacity as a private individual, and recourse for such deposits must be had against him personally by the parties aggrieved. Before any charge can be sustained against Mr. Carpenter, some record information must be produced showing that the moneys alleged to have been paid to him were actually paid and that the entries of lands claimed were actually allowed.

It appears from the alleged receipt given by H. Carpenter "Receiver," a copy of which is herewith attached, that the money was received upon an application which was "referred to the Commissioner of the General Land Office for his decision as to the right of said party to purchase said land."

It does not appear from the papers now before me under what law the application was made, but a reference to the decisions of the Department in the case of Matthiessen & Ward v. Williams (3 L. D., 282, 5 id., 180, and 6 id., 95), shows that it was an application to purchase under the act of June 15, 1880, made by Joslyn and Matthiessen & Ward as transferees, which was refused by the Commissioner of the General Land Office, and said decision was affirmed by the Department upon the ground, that the act of June 15, 1880, gave the right of purchase only to persons holding a conveyance from the entryman, and not to those claiming under a mere contract to convey.

The local officers did not pretend to pass upon the application and it was known to the applicants that their application was to be sent to the Commissioner of the General Land Office for his decision thereon, as to whether said parties were entitled to purchase as set forth in the receipt.

In such cases the applicant is not required to pay the money to the

receiver because his rights under the application would be as fully protected without payment.

By such voluntary payment he constituted Carpenter his agent to pay the money to the government in the event that his application was accepted, and upon the refusal of the application Carpenter would be individually liable for repayment, and not the government.

If the receiver is liable for the amount in his official character then it is evidently a payment to the government, and if a payment to the government I can see no reason why repayment of the amount should be made to depend upon recovery against the sureties in a suit upon their bond.

But I think it is evident that this was not a payment to the receiver in his official character, and hence, not a payment to the government.

The receiver has no authority to receive money except when tendered in payment upon an application made to the register for the purchase of lands upon which the local officers having authority to act, are ready to act.

A payment received by the local officers in advance of the time when they are ready to act upon an application and allow the entry, is not in pursuance of any duty enjoined by law, and a failure to account for such sum in the event that the application is refused is not a default as to any obligation due to the government, and the sureties would not be liable therefor.

An official bond is an undertaking to answer for the official defaults or misconduct of their principal. The sureties do not bind themselves to protect the public against other acts of their principal. *State v. Conover* 28 N. J., 230, and authorities cited in note to *Richardson v. Cole* (7 B. Mon. 250), 46 Am. Dec. 509.

In the case of *Potter v. United States* (107 U. S. 126) the court held that a receiver of public moneys is liable for money received in his absence by his authorized agent, and that the sureties on his bond cannot defeat recovery by setting up irregularities in the proceedings by which the entries of the lands were allowed. But in that case the receiver had charged himself with the money in his accounts with the government, and it was received for entries which the court presumed, in the absence of proof to the contrary, had been properly allowed. For this reason the court held that the money was justly due to the government, and that it was received by the receiver in his official capacity.

In the case now under consideration the money was not deposited with the receiver in payment of land that the government by any of its officials had acted upon, and I cannot see how the government can be in any manner liable for its repayment, nor do I think the government can recover the amount in a suit against the sureties, as it does not arise upon a default to the government.

Your decision is therefore affirmed.

TIMBER CULTURE CONTEST—PLANTING.

SEVERSON v. WHITE.

Sowing tree seeds broadcast with grain is not a proper "planting" under the timber culture law.

Secretary Vilas to Commissioner Stockslager, May 22, 1883.

On June 29, 1880, James White made timber culture entry for the NW $\frac{1}{4}$ Sec. 32, T. 136 N., R. 55 W., Fargo, Dakota.

May 19, 1884, Louis Severson brought contest, alleging failure to plant five acres in trees, tree seeds, or cuttings during the third year of said entry, and up to initiation of contest.

The local officers held that claimant had failed to comply with the the law, and recommended the cancellation of the entry.

Your office letter of April 16, 1886, reversed that decision and dismissed the contest.

The testimony shows that the tract was in charge of one Weaver; that the proper amount of breaking was done; that during the third year of the entry, 1883, Weaver allowed one Goldberg the use of the land to raise a crop of grain, on condition that he would also sow the seeds; that Goldberg sowed about a bushel of tree seeds broadcast over five acres with his oats and barley, and that this method of sowing was done under the direction of Weaver; that the ground was harrowed twice, and that the harrowing failed to properly cover the seeds; that the oats choked the tree seeds, and but very few of them sprouted; that the grain was harvested; that in May, 1884, prior to contest the land, on which but a few tree sprouts about an inch high appeared, was again plowed up by order of Weaver, together with an additional five acres, and the whole sowed broadcast in wheat and tree seeds.

It is shown in the case by testimony called for by the claimant that the method of sowing above described adopted by the entryman is not a proper method of "planting a tree claim" The failure of the trees was evidently owing to the method of planting.

From all the circumstances of the case I cannot find that the course here pursued was in compliance with the law.

Said decision is accordingly reversed, and the entry will be canceled.

RAILROAD GRANT—INDEMNITY—ACT OF JUNE 22, 1874.

HASTINGS & DAKOTA RY. CO.

A relinquishment under the act of June 22, 1874, is made to the United States, and when accepted becomes at once operative, and the company is entitled to select lands in lieu of those relinquished, provided said lands were in such condition as to warrant relinquishment, without regard to the ability or intention of the settler to perfect his claim.

The land by reason of such relinquishment is released from all claim of the company and is subject to disposal under the general land laws.

Secretary Vilas to Acting Commissioner Stockslager, March 20, 1888.

I have considered the appeal of the Hastings and Dakota Railway Company, from your decision of March 29, 1886, holding that said company had no authority to make a conditional relinquishment under the act of June 22, 1874 (18 Stat., 194); the land in controversy here being the SE. $\frac{1}{4}$ of Sec. 7, T. 116 N., R. 37 W., 5th P. M., Benson, Minnesota land district.

The only objections urged against said decision, as set forth in the assignment of errors are as follows:

"1st. In holding that the company can only relinquish to the United States unconditionally: and such relinquishment is still operative although the settler in whose favor it is made may fail to perfect his claim.

2nd. In holding that such relinquishment destroys all claim or right of the company and that the land becomes thereon public and subject to disposal under the general land laws as if the land had never been within the grant."

These exceptions, in so far as they are applicable to this case, cannot be sustained. A relinquishment under the act of June 22, 1874, is made to the United States and when accepted by the proper official of the government becomes at once operative, and the company is entitled to select lands in lieu of those relinquished, provided said lands were in such condition as to warrant a relinquishment, without regard to the ability, or intention of the settler to perfect his claim. The land by reason of such relinquishment is released from all claim of the company and is subject to disposal under the general land laws.

Your said office decision states the facts fully, and since I concur in the conclusions therein reached, the same is affirmed.

MINING CLAIM—EQUITABLE ADJUDICATION.

CORNELL LODGE.

Due compliance with the law and regulations appearing, except in the matter of furnishing proper proof of posting, the entry may be referred to the Board of Equitable Adjudication after new advertisement, posting, and proof thereof.

Secretary Vilas to Commissioner Stockslager, May 24, 1888.

By letter of October 12, 1886, your office held for cancellation mineral entry No. 577, made November 9, 1882 by C. H. Bent, *et al.* for the Cornell Lodge mining claim Lake City, Colorado, for the reason that proper proof of posting the plat and notice on the claim, was not furnished.

The proof of posting originally furnished consists of the affidavits of two persons that a proper notice and plat were posted on the dump of the discovery cut of said claim of June 3, 1882, and remained until

September 8, when it was discovered they had been destroyed, that on September 16, copies of said plat and notice were again posted and so remained until October 2, 1882. Copies of the plat and notice are not furnished with said affidavit.

In an affidavit subsequently furnished by said Bent on call of your office, he states that full proof of the posting was furnished with his original application, and that if the notice and plat are lost it is not through his fault, but through the negligence of some officer of the government. He states that the other persons familiar with the facts have now left the vicinity of the land.

There appears to be no reason from the record to question the good faith of the claimant, and, except as to the failure to prove the proper posting, the law appears to have been fully complied with. He offers on appeal to perfect his case "by again making advertisement of our application accompanied by posting on the ground and in the local office" and making proof of the same. Under the circumstances of the case I think his request should be granted and he should be allowed a reasonable time to make the proper supplemental proof. Upon the expiration of such time the case may be disposed of on receipt of such proof accompanied by an application from him for a reference to the Board of Equitable Adjudication.

Said decision is accordingly modified.

MINING CLAIM—AMENDED SURVEY.

VETA GRANDE LODE.

An amended survey is permissible where, through error of the deputy surveyor, the connecting line, as shown by the original survey, was incorrectly located, but the claim was sufficiently identified by the description given, and good faith fully manifest.

On filing such amended survey, showing the connecting line actually run upon the surface of the ground, the entry may be referred to the Board of Equitable Adjudication.

Secretary Vilas to Commissioner Stockslager, May 24, 1888.

Mineral entry No. 80, was made December 4, 1884 by C. W. Pomeroy, upon the "Veta Grande" Lode, claim survey No. 6, Lot 42, Hailey, Idaho.

The plat and field notes of survey approved June 18, 1884, connect said claim with the quarter corner between Sec's 11 and 14, T. 3 N., R. 17 E., by a line running from corner No. 3, S. 26°-46'-49"-E., 5566.1 ft. Application for patent for said claim as described in said plat and notes, was filed in the local office on June 27, 1884, and notice thereof conforming to said survey in the exterior boundaries and the connection with the public survey, was duly given by posting and publication for the statutory period from June 28, 1884. Entry was made without objection, and the papers were transmitted to your office.

Subsequently the register transmitted to your office field notes of an amended survey of said connecting line, approved February 25, 1885, by which said claim is connected with the corner common to Sec's 2, 3, 10 and 11 of said township by a line running from corner No. 3, N. 49°-06'-38" W. 4296.85 ft. Attached to said notes is the certificate of the deputy mineral surveyor wherein he certifies that the connection given in the original survey returned by him, is incorrect, and that the correction given in the amended survey is correct being calculated through lots 44 and 45.

Your office by letter of November 24, 1886, finds the amended survey also erroneous "in that the connection was not established by actual measurement on the ground as required by existing instructions", and that the survey as amended describes a claim lying wholly without, and about four thousand feet to the southeast of the claim as described in the original survey", and holds the entry for cancellation.

The good faith of the entryman in the matter is not questioned and the error in running said connecting line was made by the deputy mineral surveyor, a government officer.

It appears that all the proceedings prior to entry had reference to the ground claimed and sought to be patented, that the plat and notice were posted upon the claim as defined by the corner monuments and discovery shafts, and that the location of the claim was sufficiently and accurately established and identified by the description given.

Under these circumstances I think this entry should not be canceled. The entrymen should be allowed say ninety days from notice hereof within which to furnish an amended survey showing said connecting line actually run upon the surface of the ground, and an application for reference of the entry to the Board of Equitable Adjudication.

The case will be disposed of in that manner. The decision appealed from is modified accordingly.

TIMBER LAND ENTRY—EQUITABLE ADJUDICATION.

MARTIN H. W. BECKER.

A timber land entry may be referred to the Board of Equitable Adjudication, where the only objection thereto lies in the fact that the proof as to the character of the land was sworn to prior to the expiration of the period of publication.

Secretary Vilas to Commissioner Stockslager, May 25, 1888.

I have considered the appeal of Martin H. W. Becker from your decision of November 1, 1887, rejecting the proof in his timber land cash entry, No. 5885, made under the act of June 3, 1878 (20 Stat., 89), and embracing the NW. $\frac{1}{4}$ of Sec. 14, T. 1 N., R. 1 E., Humboldt, California.

It appears that Becker applied on the 1st of September, 1883, to

enter under said act of Congress the tract described, and that he then made the affidavit prescribed by the statute.

The register of the land office at Humboldt certifies, under date of November 15, 1883, that notice of Becker's application as above was by him (the register) posted in a conspicuous place in his office for a period of sixty days, he having first posted said notice September 1, 1883, the date of the application.

The proprietor of the newspaper, in which said notice was published, made oath before the receiver, on the 15th of November, 1883, that said notice, a copy of which is attached to his affidavit, was published in his newspaper for ten weeks successively next before the day of perfecting the entry as mentioned in said notice, to wit: beginning on the 12th day of September, 1883, and ending on the 14th day of November, 1883.

He made his proof in the form prescribed, and on November 15, 1883, no one having appeared to object, said proof was accepted, whereupon he paid for the land the sum of \$400, and received final certificate.

When the case came up for action before your office, the proof was by the decision appealed from rejected, "for the reason that the evidence of the witnesses as to the character of the land was sworn to prior to the expiration of the (sixty days) period of publication of the claimant's notice of intention to purchase."

The case of F. E. Habersham, decided by this Department December 16, 1885 (4 L. D., 282), was by you cited as authority for your said action.

Without setting out in full the specifications of error contained in the appeal, it is sufficient to say that they in substance amount to a contention that you erred in holding that the proof sworn to prior to the expiration of the period of publication should for that reason be rejected; also in holding that the ruling in the Habersham case, that being a case in which there was an adverse claim, was applicable to this case, in which no one has appeared to object to the proof; that the act of June 3, 1878, under which the entry was made, requires that the proof shall be "furnished" to the register and receiver after the expiration of the period of publication, not that it must necessarily be sworn to after that date; that in any event the proof in the case at bar was taken under and in accordance with an established practice and construction given by the local officers to the requirement in question, which practice was recognized by your office, and was not changed until long after this entry was made, the money paid for the land and final certificate issued.

These contentions are, in view of all the circumstances of the case, not without force.

The applicant showed himself duly qualified to make the entry and purchase. He made his application in accordance with the rules and regulations. Notice of said application was posted and published in

the manner and during the time required by the statute, and the entry was made after the expiration of the sixty days' notice thus required, at which time no adverse claim had been filed, nor has any yet been filed.

The proof, upon which the entry was allowed, was made according to the forms prescribed by the regulations of the Department. It showed the character of the land—that it was unfit for cultivation; that it was heavily timbered, and would, if cleared, be unfit for cultivation by reason of its being rough and rocky; that it was unoccupied and without improvements, and that there are on it no indications of gold, silver, cinabar, copper, or coal. The proof, that the required sixty days' notice was duly given, was the certificate of the register as to posting and the affidavit of the newspaper proprietor as to publication. This proof was not made until after the expiration of the full sixty days. The only objection made by your office as a ground for rejecting the proof and requiring new proof lies in the fact that the proof as to the character of the land was sworn to prior to the expiration of the period of publication. I am unable to see that this fact necessarily vitiates the proof or furnishes a good reason for rejecting the same, especially in the absence of any adverse claim. The notice posted by the register, and published in the newspaper, did not fix a day when the applicant was to appear and make proof. It simply announced the fact of the application, and called upon all persons claiming the land adversely to present their claims before the register and receiver within sixty days from the date thereof.

No such claim was presented. Had there been, a hearing would of necessity have followed to test the questions thus raised. There being no adverse claim and no objection having been made by any one, the register and receiver, after the expiration of the required publication and due proof of the same, allowed the entry and issued final certificate.

The purpose and object of the law seems to have been fully met, and by proof of a character which at the time it was accepted was in accordance with the regulations and practice of the land department. There is nothing tending to show any fraud or attempted fraud on the part of the claimant. In my judgment, the burden and expense of making new proof should not, under the circumstances, be imposed upon him.

I think there has been such substantial compliance with the law on the part of this entryman as to warrant the reference of the case to the Board of Equitable Adjudication, for action under sections 2450 to 2457 of the Revised Statutes.

You will accordingly make such reference, and in due time return the case with your report thereon, citing this decision, for the action of the Board under the statutes cited and the rules made thereunder.

Your decision is modified accordingly.

*HOMESTEAD ENTRY—PRELIMINARY AFFIDAVIT.***BRASSFIELD v. ESHOM.**

The execution of the preliminary affidavit before a clerk of court, when residence on the land had not been acquired, renders the entry voidable; but such defect may be cured by subsequent residence, established prior to the intervention of any adverse right.

Secretary Vilas to Commissioner Stockslager, May 26, 1888.

The record in this case shows that on July 22, 1880, Henry W. Eshom made homestead entry for the SE. $\frac{1}{4}$ of Sec. 30, T. 11 N., R. 5 W., Boise City land district, Idaho, and that on January 7, 1884, he commuted the same to cash entry No. 670. That on August 3, 1883, Samuel W. Brassfield filed his affidavit of contest against said homestead entry, and on November 7, 1883, a hearing was had on the issues therein raised; that in some manner, not explained by anything in the record, the testimony taken at said hearing was lost and never reached your office. It appears, however, that the local officers passed upon said testimony and decided in favor of the claimant, and from said decision no appeal was ever taken.

That upon this state of facts Brassfield was allowed, by letter of your office of date December 17, 1884, to begin a new contest against Eshom, and on January 24, 1885, he filed a new affidavit of contest, alleging, in substance, that neither Eshom, nor any member of his family, was residing on the land embraced in his said entry, at the time he made his original homestead affidavit, as required by section 2294 of the Revised Statutes, under which such affidavit was made by Eshom, July 19, 1880, before the deputy clerk of the district court of the second judicial district, Washington county, Idaho, and further, that Eshom had abandoned the land, and failed to cultivate the same as required by law, since the date of his said homestead entry, and prior to September 8, 1883, the date he made his commutation proof thereunder; and it is further stated, in said affidavit, that the allegations therein contained are substantially the same as those made in contestant's said former affidavit of contest, in relation to filing, settlement, residence and cultivation; that upon the filing of said new affidavit, a hearing was ordered by the local office, and the same was regularly had on April 7, 1885, at which both parties appeared and submitted their testimony; and upon consideration of the testimony thus submitted, the local officers disagreed in opinion, the register finding in favor of contestant, and the receiver finding for the claimant and recommending that the contest be dismissed.

The papers in the case were thereupon transmitted to your office for action, and upon consideration thereof, you, as Acting Commissioner, by letter "C," under date of September 13, 1886, approved the said finding of the register and held the homestead and cash entries of

claimant for cancellation, "on the grounds of illegality and non-compliance with legal requirements.

Claimant's appeal from this decision brings the case here.

It is also shown by the record, that claimant's said homestead entry was contested in April, 1881, by a certain George D. Gray (who is one of the present contestant's principal witnesses), on the charge of abandonment, and non-compliance with the law in the matter of settlement and cultivation, and that said contest resulted in a decision by the local officers in favor of claimant, from which no appeal was ever taken.

From the testimony in the case it is shown that claimant built a house on the land embraced in his said entry in August 1881, and established his residence therein, and that neither he, nor any member of his family, had resided thereon prior to that time; that his improvements on the land at the time of making his commutation proof, consisted of his said dwelling house, about sixteen by twenty feet in size, a cellar twelve by fourteen feet and six feet deep, a well twenty or thirty feet deep, a blacksmith's shop, about thirty acres cleared and seven or eight acres broken, and worth, in the aggregate, about \$500; that the land was dry and desert in character, covered with sage brush, and not susceptible of successful cultivation to crops, unless aided by artificial irrigation, which, up to that time, claimant had been unable to procure; that prior to making his proof, claimant had not attempted to raise any crops, owing to the character of the land, except the planting of a few acres to potatoes in as moist a place as he could find, which failed to mature, having been destroyed by stock; but it appears that an effort was being made by claimant to reduce the land to a state of cultivation, and it is shown that he had resided continuously thereon ever since August, 1881. It is further shown that claimant was prevented from taking up his residence on the land, until August 1881, as stated, by the serious and protracted illness of his wife.

The point insisted upon most strenuously by contestant is based upon the fact that neither claimant, nor any member of his family, was residing upon the land in question at the date of claimant's preliminary homestead affidavit, which was made before the clerk of the district court for Washington county, under section 2294 of the Revised Statutes, and that on the date of said affidavit there had not been any improvement and settlement made by claimant on the land, as required by said section, counsel for contestant claiming that, by reason of the foregoing, claimant's homestead entry was illegal in its inception, and is therefore null and void.

The section of the Revised Statutes, above referred to, provides that:

In any case in which the applicant for the benefit of the homestead, and whose family or some member thereof, is residing on the land which he desires to enter, and upon which a bona-fide improvement and settlement have been made, is prevented, by reason of distance, bodily infirmity, or other good cause, from personal attendance at the district land-office, it may be lawful for him to make the affidavit re-

quired by law before the clerk of the court for the county in which the applicant is an actual resident, and to transmit the same, with the fee and commissions, to the register and receiver.

In the case of *Thompson v. Lange*, reported in 5 L. D., 248, it was decided by this Department, that the preliminary affidavit of a homestead claimant having been made before the clerk of a court, instead of the local office, the entry was not for that reason absolutely void, but voidable only, and that the defect might be cured before the intervention of an adverse claim. See also case of *Roe v. Schang* (5 L. D., 394.)

In the case of the St. Paul, Minneapolis and Manitoba R. R. Co. v. Forseth, (3 L. D., 446), it was held that:

Under the homestead laws all applications to make entry are required to be accompanied by duly executed affidavits showing the qualifications of the party to make such entry. This requirement is made in order to show the good faith of the applicant, and is a matter, under the law, between him and the government. If satisfied with the showing, the application is allowed to be recorded; if not, it is rejected. If accepted on what may be thought an unsatisfactory showing of the necessary qualifications, or on a defective affidavit, either in form or substance, the entry is suspended and the party called upon to comply fully with the requirements of the Department. But such entry, if accepted, is not, because of the defective affidavit, absolutely null and void. It is an entry which may be perfected so that the party can obtain a patent for the land covered by it; or it may be avoided, because of defects, by the government, either with or without contest. But, having been accepted and recorded, until avoided, it is an entry, and as such segregates the tract from the public domain, precluding the claim of any one else to the land covered by it.

In the light of the foregoing authorities, it is clear that in the case at bar the claimant's entry was not null and void, by reason of the defect in the preliminary steps leading thereto, as stated, but merely voidable, and that the defect was such as could be cured before the intervention of an adverse claim.

The question to be determined, therefore, is as to whether the defect complained of was cured by claimant before the filing of the original affidavit of contest by Brassfield, in August, 1883.

It is clearly shown by the testimony, and not denied by contestant, that claimant settled upon and commenced improving the land in controversy, in the month of August, 1881, about two years prior to the filing of Brassfield's said affidavit of contest, and that his residence thereon immediately succeeded his settlement and was thereafter continuous.

The essential requirements of the section of the Revised Statutes, above quoted, are residence on the land by the entryman, or some member of his family, and bona-fide improvement and settlement thereon, at the date of making the preliminary affidavit in the manner therein allowed. That these requirements had not been complied with by claimant, when he made his entry, can not be questioned. But were they not fully met by him before the intervention of Brassfield's claim

by virtue of his said contest? I think they were. When Brassfield filed his said affidavit of contest, claimant was, and had been for the period of about two years, residing, with his family, on the land. He had made settlement and improvement thereon. He had done all that was required of him by the statute referred to, before any attempt was made, on the part of Brassfield, to contest his entry, and his entire good faith in the premises is abundantly shown.

I think, therefore, that claimant's said entry, though originally defective and voidable, was cured by his subsequent settlement, residence and improvement, as shown, and the same having been thus cured prior to the initiation of said contest of Brassfield, the latter can not be held to have acquired, in this respect, any rights thereunder.

The contestant's further charges of abandonment and failure to comply with the law in the matter of cultivation are not sustained by the testimony.

For the reasons stated your said office decision is reversed, the cash entry of claimant is sustained, and the said contest dismissed.

It is proper for me to state that the affidavit of one James M. Canary, which was filed pending the appeal here, by counsel for claimant, is not a part of the record in this case, and was not considered by me in determining the issues herein involved.

TIMBER TRESPASS—ACT OF JUNE 15, 1880.

COE AND CARTER.

The Secretary of the Interior has power to make a compromise for timber trespasses, but no authority to release parties absolutely and unconditionally from all liability, without compensation from them for such trespasses.

The settlement of the claim against Coe and Carter for ties purchased by them from choppers, and delivered to the railroad companies, did not include ties cut and delivered by the the sub-contractors of Coe and Carter, or release said firm from liability therefor.

The language employed in the first section of the act of June 15, 1880, does not in terms purport to grant any privilege of entry not already existing, but only to give an enlarged effect to patents after issuance.

Said act does not embrace within its intent cases of trespass, without color of excuse, on lands not purchasable, nor open to entry under the existing laws.

The fact of trespass does not, under said act, give the trespasser the right to purchase lands otherwise excluded from sale.

Secretary Vilas to the Attorney-General, May 31, 1888.

I have the honor to acknowledge the receipt of your letter of November 24, 1886, enclosing one from A. G. Campbell, Esq., United States attorney for Wyoming Territory, dated November 16, 1886, suggesting that suit be brought in the proper court to secure the cancellation of the patents heretofore issued to Coe and Carter for certain lands lying in said Territory.

The letter of Mr. Campbell was referred to the Commissioner of the General Land Office for report and recommendation; which having been made, copies thereof, with accompanying papers, are herewith sent you.

The facts connected with the subject thus brought to my consideration have heretofore been stated at much length, in correspondence with your Department, during the past two years, in relation to timber trespass by Coe and Carter. It will therefore only be necessary to refer to such matters as are pertinent to the particular phase of the case now before me.

As far back as 1876, Coe and Carter, an extensive lumber firm, cut upon the public lands in Wyoming a very large number of railroad ties, which were sold and delivered to the Union Pacific Railroad Company. Civil suit was brought against them for said trespasses on November 20, 1878. This suit was afterwards compromised and dismissed, with the approval of the Secretary of the Interior, the defendants paying all costs, and two and one half cents per tie for the estimated quantity cut by them.

Subsequently, attention being called to the fact that a very large quantity of ties had been also cut upon the public domain in said Territory by sub-contractors and delivered by them in the name of Coe and Carter to the same railroad company, for which no payment had been made, in June, 1882, demand was made upon Coe and Carter for payment for these ties, amounting to about 800,000. Upon their refusal to pay, at the instance of this Department yours caused suit to be instituted on April 5, 1884, against said Coe and Carter and one Henry Wagner to recover the sum of \$14,000 for ties cut by the latter as sub-contractor.

On April 19, 1884, application was made by Coe and Carter to the register and receiver at the Cheyenne land office to be permitted to make cash entry, under the first section of the act of June 15, 1880 (21 Stat., 237), of a number of tracts of land lying in towns 17 and 18 N., R. 80 W., in said district, aggregating 6,161.27 acres. This application was accompanied by the affidavit of Carter, wherein he states that the described lands were trespassed upon by his firm in 1876 and 1877 and material taken therefrom; that they desire to enter and purchase the same under said act of Congress, "in order that no criminal suit or proceedings by or in the name of the United States may hereafter be had or further maintained for or on account of any trespasses upon, or material taken from said lands of the United States, and that no civil suit or proceedings shall be had on account of such trespasses."

This application was transmitted to the General Land Office, and after some further testimony was submitted, identifying the lands as those trespassed upon, the Commissioner, on August 12, 1884, directed the allowance of the application. Accordingly, on September 11, 1884, Coe and Carter made cash entry for said tracts at Cheyenne, paid \$7,701.25,

and received certificate No. 391 therefor; on which patent was issued January 30, 1885.

It appears that the plats of survey of said townships were filed in the General Land Office February 8, 1884; and that at the time of the entry the lands covered thereby were unoffered, and alleged in the papers submitted to be non-mineral. It also appears that prior to said entry, Coe and Carter paid all accrued costs in the case then pending in court.

Subsequently, September 25, 1886, Coe and Carter sought to have said suit dismissed, denying any liability on account of ties cut by their sub-contractors and delivered to the railroad companies, in the firm name, and insisting that under the terms of the compromise of the former suit the firm was expressly exempted from such liability. And further that the entry and purchase of the lands trespassed upon were under said act of Congress a full settlement for said trespasses.

The facts relating to the compromise of the old suit show that on March 19, 1879, Coe and Carter proposed to Secretary Schurz to compromise that suit by the payment of "stumpage on ties purchased by us from choppers and delivered to" the railroad companies. This proposition was accepted by the Secretary, and the Attorney General informed of the fact. On March 22, 1879, the Secretary transmitted the written proposition of Coe and Carter to the Commissioner of the General Land Office, and informed him of its acceptance. Inasmuch as the Department had no definite information as to the number of ties taken from the public lands, the Commissioner was directed to send a special agent to examine the books of Coe and Carter and the railroad companies, for the purpose of ascertaining the amount for which that firm should be charged. In his letter to the Commissioner, the Secretary further said:

The ties herein referred to are those actually delivered by Messrs. Coe and Carter on their contracts with said companies. It has been stated by Mr. Coe that other parties have delivered ties under contracts of his firm with the companies. If this fact is found to be true, the ties so delivered should not be charged against Messrs. Coe and Carter.

On the strength of this language, it is insisted, "it was agreed that no liability should be incurred by Coe and Carter for ties delivered by other parties under sub-contracts;" "that equity and good conscience forbid the re-opening of" the settlement then made "on the express condition that they were not to be held liable for ties delivered by other parties under their contracts."

I am not prepared to admit that this contention can be successfully maintained.

The written proposition was to settle and dismiss the suit on payment for ties purchased by Coe and Carter from the choppers. Whether it was that the pending suit, in the opinion of the Secretary, was not broad enough to hold them liable for ties cut and delivered by their sub-contractors, or whether the Secretary thought the principals were

not ultimately liable for these acts of their sub-contractors, does not appear. But it certainly does appear that the question of present liability on account of the acts of the sub-contractors was no part of the basis of the compromise, but such liability, if thought to exist, was eliminated from and expressly excepted, by the parties thereto, out of such compromise. So that the stumpage, which it was agreed Coe and Carter was to pay, was not intended as in any way a compensation for the trespasses by the sub-contractors. Coe and Carter probably denied their liability therefor, but were willing to pay for the other trespasses, and the Secretary was willing to accept payment from them for their admitted liability, leaving the question as to the disputed liability open for future determination, either by himself or the courts, in case the sub-contractors did not pay up, or perhaps he thought the pending suit did not cover such liability. Whilst it may be conceded that the Secretary had power to make a compromise for timber trespasses upon the public lands, it can not be conceded that he has authority to release parties absolutely and unconditionally from all liability, without any compensation whatever from them, for such trespasses. And it is not to be assumed that the Secretary attempted to do that which the law did not authorize him to do, but rather to be presumed that he simply postponed the question for future consideration, or thought such trespasses not included in the case being compromised.

Viewing the matter from this standpoint, I am not satisfied that "It was agreed that no liability should be incurred by Coe and Carter for ties delivered by other parties under sub-contracts;" nor that it was contemplated by said compromise to release them from ultimate liability, on account of the trespasses perpetrated at their instigation and by their connivance. Nor am I much impressed by the statement that "equity and good conscience forbid" a further consideration of this branch of the subject. On the contrary, it appears rather to me that exact justice will not be satisfied by the release of Messrs. Coe and Carter from payment for ties cut from government land by contractors under them, especially, when the amount really paid is but the stumpage on other ties actually taken, a very moderate recompense for a trespass.

Coe and Carter made the original contract with the railroad company and undertook to furnish it with many millions of ties, and also the subsidiary agreements whereby others were induced to aid in carrying out the original contract, and thus to enter upon and denude the public lands of enormous quantities of valuable timber, and they would appear to have received the greater portion of the profits resulting from these trespasses, including, doubtless, a proportionate share of those arising from the ties cut by sub-contractors, but confessedly delivered in the name and in fulfillment of the contract of that firm. In short, whilst these ties may have been actually cut and delivered by sub contractors, the sale and delivery were probably in law the act of Coe and Carter, and inured to their profit: the trespasses, if not originally and actually

directed and authorized by that firm, became so much their act by adoption, ratification and sharing in the fruits thereof as to render them liable for the damage. Having induced the trespasses, adopted and profited by them, it seems to me that "equity and good conscience" imperatively demand that the government, whose property has been taken forcibly, should be compensated for its loss by them, the primary promoters and the principal beneficiaries of the illegal spoliation, rather than by their subordinates, who acted under their influences.

With the presentation of these views, I leave this branch of the subject to be determined by you upon the law and facts as stated.

In considering the assertion that the entry and purchase of the lands trespassed upon were a condonation of said trespasses, it appearing that the pending suit was also for trespasses upon lands in four townships not embraced in said purchase and entry, the United States district attorney was directed, November 8, 1886, to amend the petition in said case so as to exclude therefrom a demand for the value of the timber cut upon the lands embraced in said entry. In acknowledging receipt of this instruction, November 16, 1886, the district attorney says:

I do not believe that the act of June 15, 1880, authorized a sale of the lands trespassed on to Coe and Carter, and (think) that the patent issued to them is a nullity and that a suit should be instituted by the government to set aside the patent.

On reference of this letter to the Commissioner of the General Land Office, he concurs, January 3, 1887, in the views of the district attorney, and recommends the institution of such suit.

It should be further stated that on December 18, 1886, another suit was brought against Coe and Carter and the Dawsons, on account of ties cut and delivered by the latter as sub-contractors.

On March 11, 1887, a motion was also made to dismiss this suit, on the ground of the former compromise, and also, as before stated, because the alleged trespasses were said to have been committed on the land theretofore entered by and patented to Coe and Carter. Action upon the motions to dismiss both cases is now pressed for, as is shown by your letter, December 19, 1887, transmitting copy of a communication from the attorneys of Coe and Carter, urging prompt and speedy action.

Leaving the question of the former compromise to your determination, I proceed now to consider the question of the validity of the purchase and entry of the lands in question, and whether such purchase and entry condoned the trespasses admitted to have been committed thereon.

July 17, 1880, Commissioner Williamson issued a circular, construing the act of June 15, 1880, wherein, among other things, he said:

Section one provides that when any lands of the United States shall have been entered, and the government price paid therefor, neither criminal nor *civil suits*, or further proceedings shall be had or maintained on account of certain trespasses therein specified This section extends to such trespassers the privilege of paying for the land,

upon which the offences were so committed, at the price per acre for which, under the law, in force at the date of the payment, the lands could be sold. This privilege of purchase is not confined to lands subject to private entry, but extends to any lands—not mineral—subject to disposition under existing laws. (2 C. L. L., 496.)

On October 9, 1880 (*ib.* 497), the above circular was rescinded by Secretary Schurz, and another issued, wherein it was said :

The first section of said act provides that when any lands of the United States shall have been entered, and the government price paid therefor, no suits of proceedings on account of trespasses committed thereon prior to March 1, 1879, shall be had or maintained. . . . The privilege of purchase under said section is not confined to lands subject to ordinary private entry, but extends to *any lands*, not mineral, subject to disposal under existing laws. . . . When lands are plainly subject to ordinary private entry, no special application to purchase, other than the usual application in cases of private entry, is required. . . . When lands are not plainly subject to ordinary private entry, and application to purchase the same, with a view to securing the immunity contemplated by said section, you will require the application to be presented under oath of applicant, giving full and detailed statement of all the facts upon which he bases his claim to purchase.

In the case of Coe and Carter, reported in 2 L. D., 829, which arose on an application by these same parties to purchase lands in the Denver, Colorado, land district, which had been similarly trespassed upon by them, my predecessor, Secretary Teller, said :

This statute contemplates that persons who committed trespasses on the public lands—not mineral—prior to March 1, 1879, may secure themselves against criminal or *civil proceedings* therefor by purchase of such lands at the government price.

In the case of N. P. Dillon (*ib.*, 831), where the trespasses were upon unsurveyed lands in California, the same Secretary said :

The fact that the land *was not surveyed* and that the consummation of the purchase has for this reason been delayed, does not render the law inapplicable to Dillon's case, when a survey shall be made.

It is thus seen that the entry of Coe and Carter was made in accordance with the ruling of the properly authorized officers of this Department; which ruling, so far as I am aware of, has been maintained unreversed until the present time.

But after a careful examination and study of the act and the preceding legislation, I find my mind unable to agree to this construction.

The first section was intended to and does unquestionably provide for stopping criminal and civil proceedings, as to certain parties therein designated because of trespasses committed upon lands subject to purchase by them prior to March 1, 1879. But to my mind the act makes a plain and wise discrimination as to the classes of trespassers to be benefited by its different provisions. This will be made more plain by reference to its history.

Along about 1877 and 1878 the timber depredations upon the public

lands became so extensive that the land department adopted active measures to put a stop to them. To this end, a large quantity of timber was seized and proceedings instituted against the trespassers, both civilly and criminally, in the United States courts. It was claimed that these prosecutions worked a hardship, inasmuch as they were inaugurated without notice that the policy of the Department was to be changed from one which tolerated the denuding of the public domain to one which sought actively to punish those who had assumed that depredations were lawful; and because the trespasses had been committed on lands which had been filed upon under either the homestead or pre-emption laws in most cases when a claim of right was raised.

In order to condone the offenses of these parties, who had been engaged in such timber trespasses upon condition that they would buy the land which had been so taken up, the act of June 15, 1890, was introduced into the House of Representatives. It may, indeed, have been designed by its original promoters to be more extensive in its effects, or it may have been hoped its construction would be carried beyond the surface import of its terms; but its apparent purpose was as stated.

When presented by the Committee on Public Lands, its first section declared:

That when any lands of the United States shall have been entered, and the government price paid therefor in full, no suit or proceeding *civil or criminal* by or in the name of the United States shall thereafter be had or further maintained for any trespasses upon, or for or on account of any materials taken from said lands, or on account of any alleged conspiracy in relation thereto prior to the approval of this act. *Provided*, that the defendants in such suits or proceedings, begun before such full payment, shall exhibit to the proper court or officer the evidence of such entry and payment, and shall pay all costs accrued up to the time of such payment. (Cong. Rec., 2d Sess., 46th Cong., p. 1564.)

As thus reported the act met with strong opposition and much debate ensued. And as a result it was so amended as to make it condone only trespasses committed:

In the ordinary clearing of land, in working a mining claim, or for agricultural or domestic purposes, or for maintaining improvements upon the land of any *bona fide* settler, or who without any fault or knowledge of the trespass took or used any timber. Record, p. 3631.

In this form it passed the House and went to the Senate. There the second section providing for the purchase of homestead rights was stricken out and the bill passed. The House refused to concur in this, and a committee of conference was appointed, who agreed upon and reported the act as now found on the statute book.

In their report, the House committee of conference say:

As to the first section of the bill, the limitations and restrictions as made by the House bill and amended by the Senate are made to apply to civil and not to criminal suits and proceedings. *Ib.*, p. 4536.

In the light of this history, it is seen that as first reported, the bill, on purchase of the tract trespassed upon, proposed to condone both the civil and criminal cause of action; whilst the law as enacted provides that on such purchase, "no *criminal* suit or proceeding by or in the name of the United States shall be had or further maintained for any trespasses upon or for or on account of any material taken from said lands." But the right of the government to institute civil proceedings to recover damages on account of such trespasses is left intact; except in so far as limited and restricted, as stated by the committee of conference. These restrictions and limitations are very clearly set forth in the continuing language of the first section, which declares—

And no *civil* suit or proceeding shall be had or further maintained for or on account of any trespasses upon or material taken from said lands of the United States in the ordinary clearing of land, in working a mining claim, or for agricultural or domestic purposes, or for maintaining improvements upon the land of any *bona fide* settler, etc.

In short, all criminal liability will be condoned by the purchase of the land, and also the civil liability of parties coming within the specified exceptions—as to all others the civil liability remains. This, to my mind, is self-evident.

So far as regards any criminal liability of said Coe and Carter for trespasses committed, prior to March 1, 1879, they are protected therefrom by the statute of limitations, section 1044 of the Revised Statutes.

But in the view I am compelled to take of this statute, their entry was illegal, because unauthorized by law, and therefore ought neither rightfully to form the basis of title, nor of exemption from either criminal or civil liability for trespasses committed upon the public land so entered.

"It is a fundamental principle, underlying the land system of this country, that private entries are never permitted until after the lands have been exposed to public auction at the price for which they are afterwards subject to entry," "and unless Congress, by special act, ordered otherwise, private entries have never been allowed, unless the land applied for has been previously offered at public sale to the highest bidder at the same price," says the supreme court in *Eldred v. Sexton* (19 Wall., 189). This rule is, so far as I know, without any recognized exception. From this law the Commissioner, who is the creature of the law, has no right to depart, and if he does depart from it, his action is outside of the law and without its vitalizing authority.

The lands entered by Coe and Carter were unoffered; being unoffered, they were not subject to private cash entry, for the reasons stated by the court. If Congress intended to make unoffered lands subject to private entry, it doubtless would have expressed that purpose in plain terms or made its implication clearly necessary.

Did Congress use such plain and express language? The legislation on which the parties base their right of purchase is asserted to be in

the first section of the act in question. The portion of that section applicable to this claim is as follows :

When any lands of the United States shall have been entered and the government price paid therefor in full, no criminal suit or proceeding by or in the name of the United States shall thereafter be had or further maintained for any trespasses upon or for or on account of any material taken from said land.

Does Congress here say that "persons who are liable to criminal prosecution for trespasses upon the public lands are hereby authorized to purchase at private sale the land trespassed upon, whether it be offered or unoffered land?" Not at all. Does it use any language which, by clear implication, shows a purpose to confer a special right of purchase, or to enlarge, restrict or in any way to change the right of private purchase of the public lands as that right then existed; or to change the "fundamental principle underlying the land system of this country," as recognized and practiced under by the executive and proclaimed by the highest judicial authority in the government? I think not, but, on the contrary, the language is, to my mind, clear as to the purpose of the legislation under consideration. Congress directed by the act that, if parties who had committed trespasses upon the public lands, whereby under existing law they became amenable to prosecution, being entitled to make entry of, purchase and to pay for said lands, under existing law, should accordingly acquire title, the criminal liability incurred should be condoned. If the parties did not purchase the lands, either from choice, or inability, arising from want of means, or because the lands had in the meantime been otherwise appropriated in any way, or because existing laws gave them no right of such purchase, their character and liability as trespassers remained unaffected. It appears to me that the other view holds that Congress conferred upon trespassers a superior right to that enjoyed by any other class of citizens; a right, the exercise of which, required, in behalf alone of a class liable to prosecution for violation of law, a reversal of the settled practice which had obtained in the administration of the land system for nearly eighty years, and a subversion of its fundamental principles; a right, by which, would necessarily be accorded to this class, because of their criminality, the privilege of purchasing large blocks of unoffered lands, as in this case, from the purchase of which other and more worthy classes were excluded. Thus law-breakers could obtain thousands of acres of the public domain, whilst the law-abiding citizen was restricted to the obtaining of one hundred and sixty acres under the limitations of the settlement laws. It would require very plain and most express language on the part of Congress to enact in to law such intention; and I find no such express language, nor any, to authorize me to infer such a purpose in the present instance. The language employed is fully satisfied by its application to the vast number of instances then existing where lands, which had been taken up by pre-

emption or homestead declarations, or were subject to private entry, and, in respect to which, the only claim of the United States and the only loss, under the laws, which would be sustained, was measured by the purchase price, had been denuded of timber without payment of that price and with the presumable intention to avoid its payment. Being so, it is unnecessary to impute to the act the implication that it added a new right of entry to those already existing, which should be called the entry by trespass, whereby much greater privileges were secured to trespassers than to law-abiding citizens, in respect to quantity, price and terms.

The language employed does not in terms purport to grant any privilege of entry not already existing; but only to give an enlarged effect to patents after issuance. Ordinarily, the right of action, already perfect, for a trespass in cutting and carrying away timber is not discharged or assigned by a subsequent grant of land upon which the trespass was done because the land is granted, unless otherwise provided, in the condition existing at the date of the grant. This act declares that the completion of its purchase from the government, in cases where the right of entry existed, should carry the rights of action previously accrued against the purchaser; so that he took just what he would have taken had he completed his purchase without a previous trespass; working no injustice to the government which thus received the same price it would then have received.

Upon what ground then can it be justly affirmed that here is the extraordinary right of entry newly established, that is maintained on the other theory? It imputes a meaning to the language far beyond what would usually be inferred, and beyond what I think can be rightly supposed was the purpose of Congress. The anomalous character of this claimed right of entry is illustrated by practical application. The entryman must assert and prove a trespass, to found his right upon. He claims, through that fact, the privilege to buy a quantity of land, not mineral, whether subject to pre-emption homestead cash entry or not, unlimited, except by the extent of his wrong doing. How will the government agents inquire into his right and how oppose it if they think it wrongly asserted? By disputing the fact of trespass! An issue to be made as to each sub-division claimed. Thus the usual relations are transposed, and the trespasser asserts his fault to gain advantage, while the government denies it to protect the public. And how much trespass must the entryman establish upon a particular tract to acquire a right of entry? The rule must apparently be, any actionable removal of material. But is it to the exact land touched, the quarter section, or the forty-acre tract? By what rule is that to be adjudged in the absence of legislative direction in regard to so anomalous a privilege? Is trespassing like legal settlement to affect a subdivision so that by cutting a few trees the trespasser gets the right to buy the remaining body at a price for which it would be generally coveted, but at

which it is denied to all others ? If a pre-emptor failed in his final proofs to show settlement, inhabitaney, and improvement, so that the land office was bound to deny him the claimed right of pre-emption, he could establish his right by proof of his wrong-doing, and gain as a trespasser what was denied him as a citizen. When the language employed is fully satisfied by referring it to existing methods, it seem inadmissible to impute to Congress so unusual and extraordinary a purpose in its use, because clear expression of the purpose would not have been difficult, and from its peculiar nature might reasonably be expected.

I am strengthened in this view by reading the second section of said act. The purpose there was to enlarge the homestead right of parties who had made entries prior to the passage of the act. Said section allowed the purchase of entered land upon which there had been no compliance with the requirements of the homestead law ; and also allowed the purchase of the tracts so entered and neglected, by parties to whom the right of the entryman had been attempted to be transferred. But Congress was very careful to say that these provisions should only apply where said homestead entries had been made on "lands properly subject to such entry."

Is it to be supposed that Congress would be more liberally disposed towards the trespasser, amenable to the criminal laws, than to the settler, who, seeking to obtain land under the homestead law, had failed fully or partially to comply with its requirements, and then, perhaps, ignorantly attempted to dispose of his supposed right, when in fact he had nothing to dispose of ? Though the homesteader had lost the right to consummate his entry and his vendee acquired no right or title by his purchase, by their acts, neither of them had done in the case supposed, anything to render themselves liable to prosecution under the criminal laws. Yet Congress only legalized the entries and sale of lands "properly subject to entry", in the case of parties not liable to indictment, while, it is insisted, that in the case of avowed violators of the law, authority was given to them to make entries of any and all lands, whether "properly subject to such entries," or not. In the provision relating to homesteads, Congress expressed in the act the restriction intended, whilst in the other it was so well recognized and settled, both by the executive and judicial departments of the government, as a fundamental principle as old as the land system itself, that there was no necessity for such expression. In the one case the supreme court had formally decided what lands could be and what lands could not be purchased at private entry, whilst there had been no such formal declaration by that tribunal in the other case.

But still stronger appears to me the argument from the second section in another view. The trespasses which it was the purpose of the first section to condone had been largely committed upon lands which had been entered as homesteads and under pretext of the colorable right thus obtained. But inasmuch as the residence and cultivation re-

quisite to authorize commutation entries could not in most of these cases be established, it was necessary to authorize the cash entry of such lands without these proofs, in order to provide a means of acquiring the title from the United States, which was a condition of the discharge of liability for the trespass, under the first section. The purpose appears to have been to extend the facility of acquiring title in the chiefly-employed method authorized by existing laws, with a view to enlarging the number of cases upon which the first section might thus operate. But this was because the first section was not to be construed as extending to lands not, by the laws as they otherwise stood, subject to entry, or as providing a right of entry never before known; a right to be created only by proving a breach of the law and the proprietary interests of the government, and to embrace as qualified entrymen only law breakers.

Had such a theory of the first section have been in view, it would have rendered the second unnecessary, at least, in all cases of trespass upon homestead entries, which were numerous. And that the act had chiefly in contemplation such lands as had been settled upon, or entered, under pretext of settlement, is manifest from the terms of limitation used in the first section in regard to discharge of liability in civil actions; restricting the condonation to damages for "trespasses upon or material taken from the said lands of the United States *in the ordinary clearing of land, in working a mining claim, or for agricultural or domestic purposes, or for maintaining improvements upon the land of any bona fide settler.*" And from this it appears that it was lands entered colorably for homesteads, or settlement, or for mining, upon which it was understood the trespasses had been committed, which, being for other than the limited objects, ought still to leave the trespasser liable to respond in the damages sustained, although his title was perfected by a cash entry and payment.

These considerations appear to me to exclude from the intention of Congress in this act all cases of trespass on lands not purchasable nor open to entry under the existing laws, and where the trespass was without color of excuse.

Impressed by these reasons, I concur in the recommendation of the Commissioner of the General Land Office, and request that suit be brought to secure the cancellation of said patents, if after investigation it is concluded by you that such suit can be maintained.

In making this recommendation I am not unmindful of the fact, as shown herein, that my predecessors held different views of the law, and that the practice of the land office has been governed by their views; and especially am I not unmindful of the fact that by letter of November 3, 1886, from Secretary Lamar, to your Department, it was apparently conceded that the Commissioner did agree to compromise the civil liability of Ooe and Carter by the purchase of the lands trespassed upon, and that such compromise should be respected.

In differing from my predecessors, for the purpose of presenting this request to your consideration, I do not feel that I am overruling them or disregarding the rule of *stare decisis*, so far as applicable to departmental action.

The supreme court has held, in numerous cases, that the decisions of the officers of the land department, including the Secretary of the Interior, are only final so far as the facts are concerned, their ruling upon and construction of the law being subject to revision, in a proper proceeding, by the courts; and this liability to review ought to be as freely resorted to for the benefit of the public as for individuals.

In this matter I do not purpose to review or reverse any facts as found by my predecessors, but merely differ from the construction placed by them upon the law of the case.

And surely Coe and Carter should derive no benefit from these rulings unless they were correct. The only entry of the public lands which these parties could rightfully make must be under and in pursuance of law; and not by virtue of a mistaken or unauthorized permission or acquiescence of the land officers, which was outside of the law.

Being decided in my convictions in this respect, I seek, through your department, the adjudication of the questions involved by those tribunals which alone are clothed with authority to finally determine them. And I do this the more readily, because in seeking this adjudication no injustice can be worked to Coe and Carter, who will be placed before a tribunal which will protect them fully and finally in any rights they may have in the premises.

Indeed, I am not unmindful of the idea that notwithstanding the interpretation of the statute which appears to my mind necessary shall be approved by the courts, whatever equity may exist in favor of Coe and Carter by reason of the previous determination allowing their entry, will still be fully protected, whether it consist in supporting their entry as an exception, or in return of the purchase money.

If, in your opinion, the liability of Coe and Carter for the trespasses of the sub-contractors was not embraced in the compromise of the first suit, then, as a corollary of these views, the civil suit or suits pending against them should neither be dismissed, nor amended, so as to exclude therefrom the claim for trespasses upon the land embraced in their entry; but, on the contrary, I think it is most desirable that all of said suits should be pressed with the utmost vigor, for the sake of obtaining a judicial construction of the provisions of the act of June 15, 1880.

Your attention is called to another matter in connection with the illegality of the entry made by Coe and Carter. In the affidavits accompanying their application, it was stated that said lands were non-mineral, and in his letter of August 12, 1884, copy herewith, directing the allowance of said entry, the Commissioner says the non-mineral character of the land has been shown. The survey of the lands in question

was made in September and October, 1883, and in the field notes of survey it is stated, "The soil is generally unfit for agricultural purposes, and very good indications of gold and silver are everywhere apparent." Though the surveys were filed in the General Land Office in February, 1884, yet the report of the surveyor as to the character of the land does not appear to have been examined when the entry was allowed in August, 1884, but the statements in the affidavits submitted by the applicants seem to have been accepted as conclusive. In the letters of the Commissioner of October 18, and November 4, and 20, 1886, heretofore transmitted to you, this matter is referred to, and in his letter of January 3, 1887, herewith, he states that Special Agent Fry has been directed to make examination as to the character of said land and report to the United States district attorney. Should the report of the special agent show that said lands are mineral in character, it would be an additional reason for canceling said entries, inasmuch as the fourth section of the act of June 15, 1880, expressly declares that said "act shall not apply to any mineral lands of the United States."

Herewith are transmitted the papers sent by your letter of November 24, 1886, and also the papers sent by the Commissioner of the General Land Office, including a letter from him in relation to suits pending in Nebraska.

TIMBER TRESPASS--ACT OF JUNE 15, 1880.

WOODSTOCK IRON COMPANY.

In a case before the Department on appeal, the Secretary of the Interior is clothed with authority to correct any erroneous action disclosed, which has been taken to the prejudice of public interests.

As the act of June 15, 1880, granted special privileges to a special class, it is incumbent upon those seeking to avail themselves of the indemnity given by said act, to make it appear affirmatively that they come within its provisions.

Section one of said act provides, (1) That where trespass had been committed upon public lands prior to March 1, 1879, if the trespassers purchased and entered the land, criminal proceedings should not be instituted or maintained against them, because of such trespasses. (2) The remaining portion of said section relieves from civil liability settlers, miners, and other specified parties who have been technically guilty of trespass.

The said section does not authorize the purchase and private entry of lands, but only provides that where public lands were purchased and paid for in accordance with existing law criminal liability for trespass thereon should cease.

The liability of a party to criminal prosecution on account of trespass, does not in itself, under said section one of said act, confer a right to enter public lands.

Secretary Vilas to Commissioner Stockslager, May 31, 1888.

I have considered the appeal of the Woodstock Iron Company from the decision of your office of August 25, 1885, denying the application of said company to make entry of and purchase certain lands in the Montgomery land district, Alabama.

From the record transmitted it appears that said company, having extensive iron works in Calhoun county, in said State, required in its processes of reduction of ores, the use of large quantities of charcoal, which it was obtaining from wood cut upon adjacent vacant public lands. A number of homestead entries were made upon these lands, it is claimed, by speculative parties, whose claims the company was forced to purchase at an advanced price. In 1872, in order to stop this speculation, the company brought from South Carolina and Georgia a number of colored laborers, and induced them to make homestead entries of the tracts desired, for the timber, the company paying the cost of making said entries, and taking the duplicate receipts issued therefor. The requirements of the homestead law were never complied with and the entrymen after being in the employ of the company for awhile, returned to their homes or drifted away.

These entries were ninety-seven in number; and the company having successfully perpetrated this infamous fraud upon the government, and caused these ignorant men to commit perjury to that end, was able to keep all settlers from said lands and to trespass *ad libitum* upon the same.

These facts being reported to the Department suit was instituted against the company in the United States court for \$50,000 damages, on account of said trespasses. In December, 1879, with the approval of the Secretary of the Interior, this suit was compromised and dismissed by the payment of the sum of \$4,400 and costs, being at the rate of \$2.50 per acre for 1760 acres, the number which investigation showed had then been cut over.

On August 6, 1880, the company made application to purchase, under the provisions of the act of June 15, 1880 (21 Stat., 237), certain lands described in two lists accompanying its application. List "A" contains description of the lands purchased from the so-called speculative entrymen, and list "B" the lands procured to be entered by the company's employees. In connection with this application many of the matters hereinbefore mentioned were stated under oath by the secretary of the company as reasons for granting said application. It was also claimed that the amount paid by way of compromise in the damage suit and other sums paid at the time of making said entries should be taken in part payment for the lands, under section two of said act; and it was further claimed that under the third section the price of the lands was reduced to \$1.25 per acre.

On August 25, 1880, your office denied the application, stating that inasmuch as the suit against the company for trespass had been commenced and ended before the passage of the act of June 15, 1880, no case was presented for the contemplated relief thereunder, unless the company was liable to suits on account of trespasses committed prior to March 1, 1879.

But it was stated that purchase could be made by the company, under the second section of the act, of any land which had been entered under the homestead law, and the right to which had been transferred in accordance with said section, and on such purchases the amount of fees and commissions would alone be credited. And as to the lands, of which there was no written evidence of an attempted transfer of the homestead right, they would only be "subject to sale when offered in pursuance of law, unless proceedings are pending or liable to be instituted for trespass committed prior to March 1, 1879; in which case they could be purchased under the first section of said act, at the price of \$1.25 per acre.

On November 1, 1880, the register and receiver forwarded the application of the company to purchase certain lands contained in four lists, aggregating 3,842.19 acres. Accompanying were affidavits by the treasurer of the company, stating that depredations were committed on said lands prior to March 1, 1879, for which the officers of the company were liable to criminal prosecution, and that the company desired to purchase the lands in order to protect them from such liability.

On November 5, 1880, your office advised the local officers that "under the state of facts presented, the company is authorized to purchase the lands mentioned, provided that at the date of the application, namely October 27, 1880, said lands were free from prior subsisting entries and other valid adverse rights, and if the same are not mineral or coal lands."

Under this ruling the greater portion of said tracts were entered and purchased by the company and patents issued therefor. As to some of the tracts mentioned there was either no written evidence of transfer, or adverse claims existed. These entries were contested by the company through its secretary, Samuel Noble, and said entries were canceled.

The four lists transmitted were returned by your office to the register and receiver and in some way lost. Diligent search failed to recover them, and thereupon the company filed six applications to purchase the lands therein described, presumably comprising those in the lost lists, which had not been purchased; but about this there appears to be some confusion. These applications were forwarded to your office by letters of August 12, and 28, 1882, and March 17, 1883, since which time the company has been pressing for action.

On August 25, 1885, decision was rendered by your office, wherein it was held that the previous "decision of November 5, 1880, was in error in allowing the entry of 3842.19 acres of land in condonement of the company's criminal liability for trespass prior to March 1, 1879, since it is clearly shown by Agent Perdue's report that only 1760 acres had been cut upon prior to that date." And as to the six named applications pending, it was held that but two described tracts therein appear to have been cut upon, and consequently the only ones the company was entitled to purchase, under the provisions of the act of June 15, 1880;

and the applications as to these were granted, and rejected as to the others.

The appeal of the company from this rejection is now before me, and the following assignment of errors only is made :

"1. In overruling the decision of your predecessor of November 5, 1880, whereunder such applications to purchase are presented.

"2. Error of fact and law in holding that said application can not be allowed."

Rule of practice No. 88 requires that "within the time allowed for giving notice of appeal, the appellant shall also file in the General Land Office a specification of errors, which specification shall clearly and concisely designate the errors of which he complains."

The above paper is a generalization of errors, not a specification, and the appeal might be dismissed for failure to comply with rule 88. But inasmuch as the case is one between the government and the appellant the enforcement of the rule will be waived in this instance and the case considered on the record before me and the argument recently filed.

It is not necessary that I should pass separately upon the first general error assigned, viz: the right of the present Commissioner of the General Land Office to overrule the decision of his predecessor, made November 5, 1880; for the record being now before this Department, on appeal, it is unquestionably within the power and authority with which the Secretary is clothed to correct any erroneous action disclosed, which has been taken to the prejudice of the public interests.

This case resembles in some respects that of Coe and Carter (2 L. D., 829). There trespasses had been committed, by cutting timber upon the public lands prior to March 1, 1879; and civil suits to recover damages therefor had been instituted by the government, and compromised by the payment of a certain sum of money prior to the passage of the act of June 15, 1880. Afterwards, Coe and Carter made application to enter the tracts trespassed upon, under the provisions of said act, and the application was allowed by my predecessor, Secretary Teller, who held that, although the precise date when the trespasses were committed did not appear, yet it was "reasonable to suppose, in view of the allegations of the applicants, that some of them were committed within three years prior to November 9, 1880, the date of the application, and hence that on that date they were not exempt from criminal proceedings, and were then authorized to enter the tracts applied for."

In the case under consideration civil suit had been brought against the Woodstock Company for damages, which was settled by the payment of the sum of \$4,400 on November 27, 1879. But when the trespasses were committed does not definitely appear. On February 6, 1879, Special Agent Perdue reported said trespasses to the General Land Office, and urged the institution of criminal prosecution against the officers, as the company was rich and cared but little for civil suits. In said report he said: "A large portion of the wood and timber has

been cut and burned into charcoal by said company. . . . They are now and have been for years engaged in this trespass." The record shows that the so-called speculative entries, which the company claims to have purchased, were made in 1870-'72; and the fraudulent entries of its employees were made in 1872 and 1873. So that, taking the dates of the entries and the language of the special agent, the inference is strong that most, if not all, of these trespasses were committed more than three years prior to the application to enter, and it is not "reasonable to suppose" otherwise. I do not feel myself authorized, as was done in the case cited, to indulge in presumptions in favor of these applicants. But, on the contrary, I think it should be held that the act of June 15, 1880, granting special privileges to a special class, it is the duty of those seeking to avail themselves of the indemnity given by said act to make it appear affirmatively that they come within its provisions. The act of April 13, 1876 (19 Stat., 32), embodied in Section 1044 of the Revised Statutes, declares that "No person shall be prosecuted, tried, or punished for any offense not capital unless the indictment is found or the information is instituted within three years next after such offense shall have been committed." The applicants here, not having shown that trespasses upon the lands sought to be entered had been committed within three years prior to the time of making the application to purchase, the latter might have been rejected for this reason alone, if their theory of the law be correct.

But in the view of the law applicable to this case, which I take, after much consideration, it is not material to inquire whether at the time of the application to purchase under the first section of the act of June 15, 1880, the officers of the company were or were not liable to criminal prosecution for trespasses on the land in question, inasmuch as that liability did not of itself confer a right to purchase, nor its absence prohibit the purchase of lands properly subject to purchase and private entry.

The language of that section is plain and it needs only an attentive reading of it to see clearly that it provided (1) that where trespasses have been committed upon the public lands prior to March 1, 1879, if the trespassers purchased and entered the land, criminal proceedings should not be instituted or maintained against them, because of such trespasses. (2) The remaining portion of said section condones also the civil liability as against settlers, minors, and other specified parties, who have been technically guilty of trespasses, within none of which classes come the appellants here.

It is to be observed that neither in this section, nor in any other part of said act is there any expression used describing other than as public the lands which may be entered or purchased; or any language which confers a right to purchase, or which states that it was the purpose to enlarge or restrict or change in any way the right to purchase, or make private entry of the public lands; or to repeal, amend, or modify exist-

ing law in that respect. The language used is, "That when any lands of the United States shall have been entered," etc., criminal liability shall be condoned. How entered? Undoubtedly in accordance with existing law.

At the October term, 1873, of the supreme court, that tribunal, speaking through Mr. Justice Davis, in the case of *Eldred v. Sexton* (19 Wall., 189), said that "It is a fundamental principle underlying the land system in this country, that private entries are never permitted until after the lands have been exposed to public auction, at the price for which they are afterwards subject to entry," "and unless Congress by special act ordered otherwise, private entries have never been allowed, unless the land applied for had been previously offered at public sale to the highest bidder at the same price."

This was the settled law, as announced by the highest tribunal, at the time the act of 1880 was passed. Nor was it a new rule of law recently established. But it was "a fundamental principle," co-existent with land system itself, and recognized in its administration from the beginning of the century.

Did Congress by the act of 1880 intend to or in fact change this "fundamental principle"? It certainly does not say in express words that such change should be made. Is such language used as to require that an implication or inference to that effect should be made? I think not.

The case of *Eldred v. Sexton*, *supra*, by analogy, is an authority on this point. There the lands were unoffered, when Congress made a grant to the railroad company. When the line of the road was definitely located said lands were found to be within the granted limits, and being of the lands reserved from the grant, they were offered for sale at the enhanced price of \$2.50 per acre. Not being sold, they remained subject to private entry at this price. A change in the route of the railroad being desirable, it was authorized by joint resolution of Congress, which also provided that the price of lands along the original route, and not within the limits of the new route "shall hereafter be sold at \$1.25 per acre." The lands in question were outside the new route, and it was contended that this declaration of Congress fixed the price absolutely and dispensed with the necessity for offering them at public sale at the reduced price, and subjected them to private entry at that price, which entry and purchase was made by *Eldred*. But the supreme court denied this, and said:

This proposition is based on the idea that Congress intended to adopt a different rule for the disposition of these lands from that which had always obtained for the disposition of other public lands; but there is nothing in the circumstances of this legislation which tends to prove an intentional abandonment of a long existing policy. . . .

Such a purpose would conflict with the general land system and disturb its harmony, and can not be imputed to Congress in the absence

of an express declaration to that effect. This system required that all lands should be brought into market, after proper notice, so as to afford competition before being subject to private entry.

Controlled by the language here used, and the absence of any expressed purpose to the contrary, I am forced to the conclusion that the first section of said act of 1880 did not authorize the purchase and private entry of lands, but only provided that when public lands were purchased and paid for in accordance with existing law, criminal liability for trespass thereon should cease. There is nothing in the purpose of the act itself which militates against, or would be defeated by these views. *Ex gratia* Congress said that if parties who had trespassed upon the public lands bought and paid for them, they should not be criminally prosecuted. If they did not choose to buy such lands, or could not do so, either because they might not have the money to pay for them, or because in the meantime the lands had been entered under the settlement laws, purchased by other parties, otherwise appropriated, or disposed of by law, it would be the misfortune of the trespassers, and they would be amenable to criminal prosecution.

To hold otherwise would be to suppose that Congress intended to give to the law-breakers, because of their criminality, privileges of the most extensive character, which from the existence of the land system had never been accorded to those who sought to follow the law.

What was the condition of the land sought to be purchased at the date the application of the company was made and now?

By act of June 21, 1866 (14 Stat., 66), it was declared, "That from and after the passage of this act, all the public lands in the States of Alabama shall be disposed of according to the stipulations of the homestead law" of May 20, 1862, "and that the public lands in said States shall be disposed of in no other manner after the passage of this act." The provisions of this act were embodied in Section 2303 of the Revised Statutes of 1873. This section of the Revised Statutes was repealed by an act passed June 22, 1876, and which became law July 4, 1876 (19 Stat., 73), and is embodied in Section 2303 of the Revised Statutes of 1878. By said law the restricted acquisition of public land, in Alabama, to the provisions of the homestead law, is repealed, but it is expressly provided that until the lands affected by the act shall be offered at public sale, according to existing law, the same "shall not be subject to private entry."

On July 19, 1876 (1 C. L. L., 308), the Commissioner of the General Land Office, in a circular, calls attention to the last act, and states plainly that the effect of it is only to open the land to pre-emption claims and location by such scrip as may be located on "unoffered" lands; and that the act does not open the public lands to private entry until after they shall have been offered.

At the time the Woodstock Iron Company made application to enter and purchase the lands in question they had not then, nor have they

since, been offered for sale in accordance with the provisions of the act of July 4, 1876, *supra*, R. S., 2303, and consequently their purchase at private sale was expressly prohibited by said act, and the applications of the company should have been rejected as to all the lands embraced therein.

I am aware that the views herein expressed are in conflict with the construction heretofore placed upon the first section of the act of 1880 by my predecessor, but my convictions of the law are so clear and strong, that reluctant as I am to change a departmental rule of construction, I feel myself compelled to do so in this case. I therefore hold that the application of the company to make private entry and purchase should be rejected as to any lands which are not subject to such entry and purchase under the general laws. I do not understand that the pending applications include any lands on which fraudulent homestead entries were made through the collusion and promotion of said company, and the right to purchase which lands is now claimed by it through transfer under the second section of said act. If such applications were presented, a grave question would arise as to whether the concocter and promoter of the original fraud could obtain any "right" by transfer, where no right originally existed.

I have still more fully stated my opinion of the meaning of this statute in a communication to the Attorney General of this date in the case of Coe and Carter.

Your judgment is reversed as to the applications allowed and the same are rejected; and affirmed as to the rejected applications.

FINAL PROOF—EQUITABLE ADJUDICATION.

WILLIAM H. ADAMS.

An entry may be submitted to the Board of Equitable Adjudication for confirmation under rule 10, where the final proof was not submitted on the day fixed in the notice, but no adverse claim exists, and the register certifies that no one appeared to protest against said proof on the day advertised for its submission.

Secretary Vilas to Commissioner Stockslager, June 1, 1888.

William H. Adams, who filed declaratory statement for the SW. $\frac{1}{4}$ Sec. 19, T. 122 N., R. 68 Aberdeen land district, Dakota, November 28, alleging settlement May 1, 1883, published notice of his intention to make proof before the register and receiver at Aberdeen on April 10, 1884.

The proof is dated April 17, 1884, and was accepted by the local officers and cash certificate was issued the same day.

August 27, 1886, you suspended the cash entry and required the claimant to publish a new notice of intention to make proof.

From this decision the claimant appeals. Accompanying the appeal is an affidavit of the claimant stating "that upon the day named in his

final proof notice, affiant with his two final proof witnesses appeared at the United States land office at Aberdeen, D. T. and offered proof in support of his said entry; that said proof was accepted and a receipt issued for the money paid upon said proof." Claimant further alleges that he has disposed of the land and cannot make new proof; that he did not know that the date given in the proof was different from that given in the notice until he was informed, two years after, by the letter of the Commissioner suspending the entry, and supposes the discrepancy in dates to be due to the great press of business at the office at that time and that proofs were not dated until after they had been examined as to their sufficiency.

Claimant's statement that he made proof upon the day named in the notice, April 10, and that his money was accepted and a receipt issued to him, is not confirmed by the receivers receipt which is dated April 17th, nor by the affidavit of Dr. Seabright, filed in the case. The physician swears: "That at no time from the 8th day of April A. D. 1884 to the 16th day of April 1884 has it been possible for said William H. Adams to leave his bed or to attend to any matters business or otherwise, owing to the serious nature of his illness."

The discrepancy between the two statements is not explained.

However, as there is no adverse claim of record and as the register certifies that no protestant appeared at the date named in the published notice, the case seems to fall within the spirit of rule 10 of the rules of equitable adjudication. You will therefore please certify the case to the Board of Equitable Adjudication for the action of that tribunal.

Your decision is modified to conform to this decision.

PRE-EMPTION—ALIENATION—"TRADE AND BUSINESS."

LYONS ET AL. v. IVERS.

An entry is invalid and must be canceled where it appears that the pre-emptor, prior to final proof, had disposed of portions of the land entered, and agreed to convey the remainder on securing title thereto.

Land settled and occupied for the purposes of trade and business at the date of entry is not subject to the right of pre-emption.

Secretary Vilas to Commissioner Stockslager, June 1, 1888.

This record presents the appeal of Robert J. Ivers from the decision of your office dated February 2, 1887, holding for cancellation his pre-emption cash entry made October 12, 1885, for the S. $\frac{1}{2}$ SE. $\frac{1}{4}$, and NE. $\frac{1}{4}$ of SE. $\frac{1}{4}$, Sec. 24, T. 22, R. 32 E., Lakeview, Oregon.

The record shows that Ivers filed declaratory statement for said tract November 17, 1884, alleging settlement July 5, 1884, and made final proof September 28, 1885.

In February 1886 the affidavits of H. W. Lyons, and others were filed in the local office, alleging that at the date of said entry and for a long

time prior thereto, the SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of said section was used for the purposes of trade and business and not for agriculture, and that Ivers had failed to comply with the pre-emption law in the matter of cultivation.

Your office by letter of April 10, 1886, ordered a hearing on said allegations, and on July 26, 1886, the parties in interest, with their attorneys, appeared before the local officers and submitted testimony.

It appears from the testimony that on July 5, 1884, Ivers went upon the land and laid the foundation for a house in the southeast corner of said section, that he then went to the Grande Ronde valley in the northeastern portion of the State, where it seems his family then resided, and remained in that vicinity working until the latter part of November ensuing; that he then returned to the land, purchased a cabin standing on an adjoining tract, moved it on to the land in dispute, and took up his actual residence there with his family early in December; that his residence on the tract has, since that time been continuous; that he sowed about five acres in grain, cultivated a garden, and had improvements valued by him at \$800.

On May 23, 1885, Ivers made proof before a notary public, which was rejected by the local officers on July 11, 1885, as appears by an indorsement thereon, "for the reason that the tract described therein does not comply with the tract entered, as shown by the records of this office." The land was described in the proof as, "E. $\frac{1}{2}$ SE. $\frac{1}{4}$ and SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 24, T. 22 S., R. 32 $\frac{1}{2}$ E."

Thereafter, on September 28, 1885, he again made proof as above stated.

The testimony further shows that on his return from Grande Ronde valley, Ivers found on the tract a blacksmith shop, an office of a notary public, a foundation for a store, and a dwelling occupied by one Davis, that the notary's office and foundation were removed by order of Ivers, that he bought the blacksmith shop, and that Davis left the land at Ivers' request; that on September 23, 1885, the date of the proof on which the entry was allowed, there were on the land a blacksmith shop, a livery stable, a doctor's office and drug store, a saloon building, a flour and feed store, a general merchandise store, and the dwelling and stable of one James, and between twenty-five and thirty inhabitants.

It is claimed on the part of contestants that these buildings were constructed under agreements made with Ivers, that the ground was staked out and laid off as a townsite in 1884 by his consent, that Ivers proposed to have a town built on his land, and that in furtherance of this project he gave away town lots to certain individuals.

T. B. James testifies that in June 1885, Ivers agreed to sell him as many lots as he wanted, and asked him to remain and help build up a town; that they then selected certain lots agreed on the price, and he paid Ivers \$20 in part payment. J. H. Loggan testifies, that about April 1, 1885, Ivers told him he was going to have a townsite laid out,

and would give him a lot to put a building on. W. R. Gibson testifies, that about September 1884, Ivers said he intended the land for a town-site and agreed to give him an interest in the tract as soon as he secured title under the pre-emption law; that Ivers authorized him to dispose of certain lots, and that in pursuance thereof, he (Gibson) gave a lot to a Mr. Mahony, one to a Mr. Gordon and one to a Mr. Thomas. N. T. Fisk testifies, that in June 1885, he made arrangements to take two lots from Ivers, that Ivers selected one lot for him, that he (Fisk) then and there unloaded some lumber which he had brought for the erection of a feed stable, that the stable was built later in the same month, and that Ivers said he would charge Fisk \$40 for one of the lots and give him the other. Thomas Bain testifies that in March 1885, he went to the tract in dispute in search of a location for a store; that he met Ivers and the latter agreed to give him two lots on this tract, one for a store, the other for a dwelling house; that about April 27 following, he again saw Ivers and gave him \$30 to be used in erecting a store building, that the store building was put up by a Mr. Boyle and others; that on May 18, 1885, he commenced selling goods—general merchandise—therein, and so continued carrying on that business up to the time of hearing; that on June 1, 1885, his stock in said store was worth from \$1,000 to \$1,200, and in September, 1885, from \$5,000 to \$6,000; that Ivers was one of his customers, and that his name as such appears on the books as early as May 18, 1885; that in June 1885, Ivers executed a lease to him of the store building for a term of three months commencing June 1, 1885. In proof of this latter assertion a memorandum in writing signed by Ivers and Bain in June, 1885, and witnessed by J. W. Brown, is submitted as evidence, reciting that R. J. Ivers has “leased and conveyed to the said party of the second part (Thomas Bain) the new store house in Harney City, now occupied by said party of the second part, for a term of three months from the first day of June, A. D. 1885.” Harney City is the name given by the witnesses to the settlement here in question.

Bain further testifies that about September 22, 1885, he and James made an agreement with Ivers for the purchase of the entire tract for \$700, the sale to be consummated when Ivers procured his title under the pre-emption law. In this he is corroborated by James and Fisk, the latter stating that he heard Ivers tell Bain to “go ahead and tend to the trading and selling of the lots the best you can, for if I offer to sell or trade I can’t prove up.”

Ivers admits that in June 1885, two months before the proof on which his entry was allowed, he laid out the land in streets, lots and blocks for the purpose of building a town. He denies generally the allegations of the other witnesses that he agreed prior to August 1885, to give away or sell any lots.

After a careful review of the testimony I am satisfied that the allegations of the witnesses above cited are substantially true, and that

Ivers, prior to his proof of September 1885, had entered into agreements by which his title to be obtained under the pre-emption law should inure to the benefit of others.

Section 2262, R. S., requires that a person claiming the benefits of the pre-emption law, before making the entry shall make oath "that he has not settled upon and improved such land to sell the same on speculation, but in good faith to appropriate it to his own exclusive use; and that he has not directly or indirectly, made any agreement or contract in any way or manner with any person whatever, by which the title which he might acquire from the government of the United States should inure in whole or in part to the benefit of any person except himself, and if any person taking such oath swears falsely in the premises, he shall forfeit the money which he may have paid for such land, and all right and title to the same."

This affidavit was made by claimant in his proof. As the testimony shows that he had prior to the making of said affidavit entered into the agreements above set forth, the entry based on such affidavit is illegal and must be canceled.

Again, Section 2258, U. S. Revised Statutes provides:

The following classes of lands unless otherwise specially provided by law shall not be subject to the rights of pre-emption, to wit:
Lands actually settled and occupied for the purposes of trade and business, and not for agriculture.

The pre-emption right is exercised at the date of entry. The status of the land at that period, therefore, must determine whether it is subject to purchase under the pre-emption law. Prior to that date the settler under the pre-emption law has no vested right as against the government. In the case of *Frisbie v. Whitney* (9 Wall., 187), the supreme court, quoting the language of the Attorney General, stated the law on this point, as follows:

It is not to be doubted that settlement on the public lands of the United States, no matter how long continued, confers no right against the government. . . . The land continues subject to the absolute disposing power of Congress, until the settler had made the required proof of settlement and improvement, and has paid the requisite purchase money. . . . His settlement protects him from intrusion or purchase by others, but confers no right against the government.

The grain and garden vegetables planted soon after settlement never matured, but were allowed to perish from want of care. The cultivated ground was not enclosed, and roving cattle tramped out every thing that sprouted.

It thus appears that the land was not subject to the right of pre-emption at date of entry, by virtue of the provision of said section 2258.

The loss of this tract of land is clearly due to Ivers' own actions. Had he so desired, he might have maintained his claim against all intruders.

For the reasons herein stated, said decision is affirmed.

RAILROAD GRANT—ACTS OF JANUARY 13, 1881, AND MARCH 3, 1887.

ROESCHLAUB *v.* UNION PAC. RY. CO. ET AL.

A homestead entry of record at the date of definite location excepts the land covered thereby from the operation of the grant, although it may appear that at said date the settler has abandoned the land covered by his entry.

The term "selection" is inaccurately used when applied to lands within the primary limits of a grant.

The right to lands within the granted limits is determined by definite location and not by "selection"; and the fact that a tract has been incorporated by the company in a list of lands for which patent is sought, adds nothing to its right thereto and does not take it out of the category of public lands. If the tract was excepted from the grant, it remains public land, open to entry or settlement.

The right of purchase conferred by the act of January 13, 1881, extends only to lands within the limits of a railroad withdrawal which may have been restored to the public domain, and lands not withdrawn are not subject to purchase under said act.

Applicants for the right of purchase under said act are required to make oath to the facts of settlement and improvement, and show the qualifications required of such purchasers by the terms of said act.

The right of the purchaser under the fifth section of the act of March 3, 1887, is defeated by the settlement of another made after December 1, 1882, whether the purchase was made before or after said date.

The case of *Nyman v. The St. Paul, M. & M. Ry. Co.* overruled.

Secretary Vilas to Commissioner Stockslager, June 1, 1888.

On December 23, 1884, Henry F. Roeschlaub made homestead entry for W. $\frac{1}{2}$ NE. $\frac{1}{4}$ and W. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 21, T. 4 S., R. 68 W., at the land office in Denver, Colorado. On November 27, 1885, he made commutation proof, and cash certificate issued to him the same day. The proof shows that he is a married man, with wife and four children, that his residence was continuous from settlement, that he cultivated fifteen acres, and that his improvements including a house, barn, well, fencing, brick cellar, and ditches, were valued at \$1700.

The other claimants for the land are the Union Pacific Railway Company and Marian W. McIntyre and R. M. Henderson, purchasers under the company.

The tract is within the limits of the withdrawal made for the benefit of the Kansas (now Union) Pacific railway company on map of definite location filed May 26, 1870.

Prior thereto, on December 13, 1866, one Mary Hooper made homestead entry for the tract and the entry remained intact until November 22, 1870, (after the rights of the company attached on definite location) when it was canceled.

The land was listed by the company February 11, 1879. It has not been patented.

It is alleged in a petition filed May 11, 1885, signed by said Henderson and McIntyre, and not sworn to, that said railroad company on

August 7, 1882 sold and conveyed said land by deed to one John C. Montgomery, that on August 17, 1882 said McIntyre purchased of said Montgomery an undivided one-half interest in said tract for the sum of \$2500 and then and there entered and took possession of said tract and settled upon the same and made valuable and permanent improvements thereon, and has ever since until a few weeks last past been in actual, sole, exclusive use and possession of the said property, claiming title thereto under said deed from said Montgomery, and from the said railroad company; that on or about September 6, 1884 said Montgomery sold and conveyed the other undivided one-half interest in, and to said property to said Henderson for \$4000 and thereupon said Henderson entered into the joint possession with said McIntyre; that said Roeschlaub, when he first made entry of said tract, was well aware that said lands were held and possessed and claimed to be owned by these petitioners, and of the fact that said petitioners had made valuable and permanent improvements thereon. The petitioners therefore asked that a hearing be ordered "in respect to the facts set forth," and if their title under the company be found not good, that they be allowed to purchase the tract under the provisions of the act of January 13, 1881 (21 Stat., 315). They further set forth that they are unable to acquire title under the pre-emption or homestead laws.

Your office by letter of August 12, 1886, rejected the claims of the company and said purchasers and awarded the tract to Roeschlaub.

It is insisted by the company, in the first place, that the land was not excepted from the railroad grant.

This proposition must be decided in the negative. At the date of the definite location the tract was covered by a homestead entry. It was therefore excepted from the grant. But, it is urged by the company, that at a hearing held at the local office it was shown that said Hooper lived on the land but a short time after entry, that she moved away in the spring of 1867, and did not return; that the land was abandoned at date of definite location, and the entry alone without a living claimant could not operate to except the tract from the grant. The lands excepted from the operation of the grant among others are defined in the granting act as those to which a pre-emption or homestead claim may have attached at the time the line of said road is definitely located. (12 Stat., 492).

In discussing this exception in the act now in question the court in the case of *Kansas Pac. Ry. Co. v. Dunmeyer* (113 U. S. 629), said:

Of all the words in the English language, this word *attached* was probably the best that could have been used. It did not mean mere settlement, residence, or cultivation of the land, but it meant a proceeding in the proper land office, by which the inchoate right to the land was initiated. It meant that by such a proceeding a right of homestead had fastened to that land, which could ripen into a perfect title by future residence and cultivation. With the performance of these conditions the company had nothing to do. The right of the homestead hav-

ing attached to the land it was excepted out of the grant as much as if in a deed, it had been excluded from the conveyance by metes and bounds. . . .

When the line was fixed, which we have already said was by the act of filing this map of definite location in the General Land Office, then the criterion was established by which the lands to which the road had a right were to be determined. Topographically this determined which were the ten odd sections on each side of that line where the surveys had then been made. Where they had not been made, this determination was only postponed until the survey should have been made. This filing of the map of definite location furnished also the means of determining what lands had previously to that moment been sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim had attached; for, by examining the plats of this land in the office of the register and receiver, or in the General Land Office, it could readily have been seen if any of the odd sections within ten miles of the land had been sold, or disposed of, or reserved, or a homestead or pre-emption claim had attached to any of them. In regard to all such sections they were not granted.

The entry of Hooper existing at the date of definite location, under the principles announced by the court, excepted the tract from the grant. See also *St. Paul M. & M. Ry. Co. v. Bakke* (4 L. D., 281); *Northern Pac. R. R. Co. v. Urquhart* (Ibid. 421); *Nyman v. St. Paul M. & M. Ry. Co.* (5 L. D., 396).

Again it is urged by the company that the entry of Roeschlaub should be canceled for the reason that it was made pending the "selection" of the company made February 11, 1879. The term "selection" is here inaccurately used. In the language of such grants it has reference only to lands in the indemnity limits as distinguished from those in granted limits.

It is true that in the case of *Nyman v. St. Paul M. & M. Ry. Co.* *supra*, it was said, in speaking of a "selection" by a railroad company of a tract in its granted limits, "when said selection had been allowed and posted upon the records of your office the homestead entry should not have been allowed until the selection had been canceled." There is no reason in the law, however, for such practice.

The right of the company attaches in the granted limits on definite location, and not by selection as in the indemnity limits. Therefore the question raised by an application to enter lands within granted limits is whether such lands passed under the grant. The fact that the company has incorporated such tract in a list of lands for which it is seeking patent, adds nothing to its right to such tract, and does not take it out of the category of public lands. If the tract was excepted from the grant it remains public land, open to entry or settlement. The listing of the land by the company for patent in no manner affects the status of the land. Said last mentioned decision, in so far as it conflicts herewith, is therefore overruled. Said objection to the entry of Roeschlaub is not well taken.

The act of January 13, 1881, under which Henderson and McIntyre apply to purchase is as follows :

That all persons who shall have settled and made valuable and permanent improvements upon any odd numbered section of land within any railroad withdrawal in good faith and with the permission or license of the railroad company for whose benefit the same shall have been made, and with the expectation of purchasing of such company the land so settled upon, which land so settled upon and improved, may, for any cause, be restored to the public domain, and who, at the time of such restoration, may not be entitled to enter and acquire title to such land under the pre-emption, homestead, or timber-culture acts of the United States, shall be permitted, at any time within three months after such restoration, and under such rules and regulations as the Commissioner of the General Land Office may prescribe, to purchase not to exceed one hundred and sixty acres in extent of the same by legal subdivisions, at the price of two dollars and fifty cents per acre and to receive patents therefor.

It will be noted that the right to purchase is extended only to lands within a railroad withdrawal which may have been *restored* to the public domain. The act applies only to lands that had been withdrawn from the public domain for the benefit of the railroad. This is indicated by the use of the term "restored to the public domain", which ordinarily presupposes a withdrawal from the public domain by virtue of a statute or the action of the executive. The contemporaneous construction points in the same direction. The circular issued by the General Land Office on May 28, 1881, prescribes that :

Only lands settled upon can be purchased under this act, and only the actual settler at the date of the restoration can be permitted to make such purchase, and only land in withdrawn and restored odd numbered sections can be purchased.

Claimants desiring to purchase under this act must make application in writing to the proper district land office within three months from the date of restoration as fixed by public notice.

These instructions were issued by authority given in the act itself and clearly restrict the right of purchase to lands withdrawn for the railroad company and afterwards restored to the public domain. As the land in question here was never withdrawn for the company it cannot be purchased under said act.

Again said circular of instruction requires that :

Every person applying to make entry under this act must make and subscribe the following affidavit :

I . . . of . . . claiming the right to enter the . . . of section . . T . . R . . . under the provisions of the act of Congress approved January 13, 1881, entitled "An act for the relief of certain settlers on restored railroad lands" do solemnly . . . that I was an actual settler on said tract at the time of the restoration thereof to the public domain of the United States to wit on the . . day of . . 18 . . : that prior to said time I had made valuable and permanent improvements on the land ; that my settlement was made in good faith and with the permission or license of the . . . railroad company and with the expectation of purchasing said land from said company and that I am not entitled to enter and

acquire title to said land under the pre-emption, homestead, or timber-culture laws of the United States for the reason that ; and that my improvements on said land at the date of the restoration thereof to the public domain consisted of

Similar instructions were again issued by the Department on April 30, 1886. (5 L. D., 165.)

Said purchasers under the company have wholly failed and refused to furnish any affidavits in the premises, although their attention was called to the requirement by the brief of Roeschlaub in January 1886, and again November of the same year. On the other hand Roeschlaub furnishes his own affidavit, corroborated by four others, to the effect that at the date of his entry said land was wholly unoccupied and unimproved, that no person had settled upon, cultivated or in any manner improved the same; that the tract was not enclosed and was entirely vacant, uninhabited and uncultivated, and that not one dollar had been expended on said tract in any way or manner.

In view of this condition of the record, and of the failure on the part of said purchasers to conform to the plain requirements of said circular, I must refuse to subject the entryman to the expense and delay of a hearing for which no proper ground is laid, for the purposes of this case it will be assumed that the allegations in said affidavits of Roeschlaub and others are true. It thus appearing that said purchasers had not settled and made valuable and permanent improvements on said tract another reason is furnished for rejecting the application to purchase under said act of 1881.

Among the papers is also the application of said Henderson and McIntyre to purchase the tract under the fifth section of the act of March 3, 1887 (24 Stat., 556). Said section is as follows :

That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary government price for like lands, and thereupon patents I shall issue therefor to the said bona fide purchaser, his heirs or assigns: *Provided*, That all lands shall be excepted from the provisions of this section which at the date of such sales were in the bona fide occupation of adverse claimants under the pre-emption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor: *Provided*, That this section shall not apply to lands settled upon subsequent to the first day of December, eighteen hundred and eighty-two, by persons claiming to enter the same under the settlement laws of the United States, as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases.

The application must be denied as appears by the instructions issued under said act (6 L. D., 276) as follows:

Under the last proviso of said section (five), however, if a settlement was made on said lands subsequent to December 1, 1882, by persons claiming the same under the settlement laws of the United States, it will defeat the right of the purchaser whether said purchase was made prior to or subsequent to December 1, 1882, and the settler will be allowed to prove up for said lands as in other like cases.

After a full examination of the case I fail to find any reason for disturbing the entry of Roeschlaub. The decision appealed from is, accordingly, affirmed.

CONTEST—DEATH OF CONTESTANT—PREFERENCE RIGHT.

RASMUSSEN v. RICE.

The death of the contestant, as between the parties, has the effect to work an abatement of the contest.

The preferred right of entry, accorded under the act of May 14, 1880, is a personal right, and on the death of the contestant, the case is thereafter between the entryman and the government.

Although at the date of the initiation of the contest the entryman had not in all respects complied with the law, yet as good faith is apparent, and no adverse claim exists, the entry is allowed to remain intact.

Secretary Vilas to Commissioner Stockslager, June 2, 1888.

I have considered the case of Christian Rasmussen v. John W. Rice, on appeal by Rice from your decision of July 13, 1886, holding for cancellation his timber culture entry, No. 1216, made September 13, 1879, upon the NW. $\frac{1}{4}$ of Sec. 4, T. 106 N., R. 37 W., Tracy, Minnesota.

The record shows that Rasmussen filed his affidavit of contest March 16, 1885, charging failure and neglect on the part of claimant to fully comply with the law in the matters of planting and cultivation.

A hearing was ordered for May 7, 1885. On that day, on motion and by consent of parties, the complaint of contestant was amended so as to make it more specific. As amended, it in substance charged failure to plant as many as five acres of trees, or to cultivate those planted, and that there were not, at the date of the hearing, to exceed three hundred growing trees on the tract.

On the evidence adduced at the hearing, which was had at the local land office, the register and receiver found for the claimant, and held that the contest should be dismissed. On appeal, your office found that only about seven acres had been broken at the date of the hearing; that although there had been planting and replanting, there were at the date of the hearing only about fifteen hundred growing trees on the claim, and that the cultivation had been defective. Finding that claimant was thus in default at the time of the initiation of the contest, you

held his entry for cancellation. From that judgment claimant appealed to the Department.

Since the case came here on appeal, evidence has been filed, including the affidavit of his attending physician, showing that the contestant died on February 28, 1887. This fact as between the parties has the effect to work an abatement of the contest. The preferred right of entry possible to acquire in contest cases, under the act of May 14, 1880, is a personal one and dies with the contestant, and the case thereafter becomes one between the entryman and the government. *Morgan v. Doyle* (3 L. D., 5); *Hotaling v. Currier* (5 L. D., 368).

In this case, while it does not clearly appear that claimant had at the date of initiation of contest planted full ten acres to trees, tree-seeds, or cuttings, his efforts at planting and replanting I think evidence his good faith.

Soon after the initiation of contest, and as early in the spring as such work could be done in the latitude in which the land lies, claimant did further planting, and he probably has now, a sufficient area in trees to meet the full requirements of the law, and has expended a considerable sum of money in thus improving, planting and cultivating. I am therefore of the opinion that his entry may properly be allowed to remain intact, subject to his future showing of compliance with the law.

Your decision is accordingly reversed, and the contest dismissed.

RAILROAD GRANT—SETTLEMENT—CITIZENSHIP.

SOUTHERN PAC. R. R. CO. *v.* GARDETT.

On due proof of naturalization the presumption is raised that every pre-requisite to the judgment of the court was duly shown, and that the declaration of intention to become a citizen was filed at least two years prior thereto.

The settlement of a qualified homesteader existing at the date of indemnity withdrawal excepts the land covered thereby from the operation of said withdrawal.

Secretary Vilas to Commissioner Stockslager, June 2, 1888.

December 11, 1885, Peter Gardett made homestead entry for the N. $\frac{1}{2}$ NE. $\frac{1}{4}$, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, and NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 33, T. 26 S., R. 30 E., M. D. M., Visalia, California, and on April 26, 1886, submitted final proof.

The land is within the indemnity limits of the withdrawal for the benefit of the Southern Pacific railroad company under act of July 27, 1866, (14 Stat., 292) ordered by letter of March 22, 1867, and received at the local office May 21, 1867.

Gardett first applied to make said entry on May 2, 1884, alleging that he had resided continuously on the land since 1860. A hearing was ordered to ascertain the facts, but it appears the order was not carried into effect, and Gardett made entry and proof as above stated. At the taking of the final proof the attorney for the company appeared and cross examined the witnesses.

It appears from the proof, and the local officers so found that Gardett has occupied and claimed this land since the year 1860, with the exception of eight months in the year 1870, during which period he lived on a neighboring pre-emption claim; that after making proof on the pre-emption claim in August 1870, he again returned to the land in question and has since maintained his residence there; that he was married in 1871, has fully complied with the law, and that his improvements are worth from \$1000 to \$1500.

Your office by letter of August 10, 1886, held that the claim of Gardett excepted the land from the operation of said withdrawal.

On appeal it is urged by the company that at the date of the withdrawal claimant was an alien, and for that reason his claim was not such as would except the tract from the operation of the withdrawal.

The record shows that Gardett was fully naturalized in the county court of Kern county, in said State, on September 7, 1868. Section 2165 of the Revised Statutes requires that an alien shall file his declaration of intention to become a citizen at least two years prior to his admission to citizenship. The production of the naturalization papers raises the legal presumption that every prerequisite to the judgment of the court admitting claimant to citizenship was shown on September 7, 1868, and it will therefore be presumed that his declaration of intention to become a citizen was filed at least two years prior to that date, to wit, on September 7, 1866. This date is prior to that on which the withdrawal took effect. The company has not selected the tract.

The grant to the company was of:

Ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, *occupied by homestead settlers* or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior.

In the case of *Swanson v. Southern Pacific R. R. Co.* (3 L. D. 285) it was said in reference to this granting clause:

Although the foregoing provisions have reference to granted lands, I am of opinion that, if by the express language cited such lands occupied by homestead settlers are excepted from the operation of the grant and are made the basis for indemnity selection, *a fortiori* should such occupation of lands in the indemnity limits entitle the claimant to consummate his entry, if he appears and asserts his right prior to any attempt of the company to select the same. No such selection having been made, this case falls within the rule laid down by the Department in the *Prest* case (2 L. D., 506), decided on the 23d of May last, wherein the question was elaborately considered. In the case of *Ryan v. Cent. Pac. R. R. Co.* (99 U. S., 383), the court said: 'The railroad company had not and could not have any claim to it until specially selected.'

The fact that Gardett, eventually, and before any other claim intervened, came in and asserted his claim under the homestead law, will be taken as evidence of his intention to so claim the tract from the date of the passage of the homestead act, in the absence of any evidence to the contrary.

It is therefore held that the claim of Gardett excepted the tract from the operation of said withdrawal.

Said decision is, for the reason given herein, affirmed.

PRACTICE—MOTION TO DISMISS—PREMATURE ENTRY.

WRIGHT v. MAHER.

Pending final adjudication as to the validity of an entry in litigation, the entry of another for the same land should not be allowed.

If a motion to dismiss for the want of sufficient evidence is sustained by the local office, the entry should not thereafter be canceled without allowing the defendant due opportunity to submit evidence.

Secretary Vilas to Commissioner Stockslager, June 4, 1888.

I have considered the case of Eugene A. Wright *v.* Richard Maher, as presented by the appeal of the latter from the decision of your office, dated June 23, 1886, holding for cancellation Maher's timber culture entry, No. 5597, of the SW. $\frac{1}{4}$ of Sec. 1, T. 113 N., R. 76 W., made July 24, 1884, at the Huron land office, in the Territory of Dakota.

The record shows that on June 18, 1882, the township plat of survey, embracing said tract, was filed in the local land office; that on January 22, 1883, one John J. Shane made timber culture entry, No. 1011, of said tract, which was held for cancellation by your office on November 2, 1883, and on January 25, 1884, the entry was canceled and sixty days allowed for appeal; that on February 4, 1884, Maher made timber culture entry, No. 4478, for said land; and on April 29, 1884, the cancellation of Shane's said entry was declared final; that on July 12, 1884, said entry of Maher was canceled, because made before the expiration of the sixty days allowed Shane for appeal, and Maher was allowed to make a new entry, within a reasonable time after notice, "in the absence of vested rights"; that on July 19, 1884, said Wright offered to enter said land under the timber culture law, but his application was rejected by the local land office; that on July 24, 1884, Maher made a second timber culture entry, No. 5597, for said land, and on August 26th following Wright applied to enter said tract under the homestead laws, and his application was forwarded to your office by the register and receiver.

It also appears that your office, on November 5, 1884, ordered a hearing to determine the rights of the respective parties, and, by stipulation, the testimony was taken before a notary public, and filed in the local land office on February 26, 1885.

On March 2, 1885, pursuant to notice given at the close of the taking of the testimony, Maher moved to dismiss the case, for the reason that

Wright had failed to show a prior right to the land in question. The motion to dismiss was granted by the receiver, and a motion for a rehearing made by counsel for Wright, on the ground of newly discovered evidence, was denied by the same officer on March 23, 1885. Wright appealed on April 4, 1885, and your office, on June 23, 1886, reversed the action of the local officers, and awarded the prior right to the land to Wright.

Your office found from the testimony that Wright erected a house, ten by twelve feet, on said land, and maintained therein, with his family, an actual continuous residence from June 11, 1884, up to August 26, same year, when he applied to enter the land under the homestead laws; that the settlement and residence of Wright took effect immediately upon the cancellation of Maher's first entry, notice of which was received, as inferred by you, at the local land office shortly after the rejection of Wright's timber culture application, on July 19, 1884; that Maher's second timber culture entry was allowed, "subject to the vested adverse right of Wright, which the latter asserted when he applied to enter on August 26, 1884," and the fact that Wright had applied to make timber culture entry of the land on July 19, 1884, could have no effect upon the validity of his subsequent application under the homestead laws. Your office, therefore, sustained the appeal, and stated, "I return Wright's homestead application and affidavit, and you will allow him thirty days in which to exercise (his) right to have his entry placed upon record," and in case Wright enters said land, Maher's said entry will be canceled.

On October 11, 1886, your office advised the local land office that the failure of Wright to make homestead entry of said land within the time required, was owing to the fault of your office in not returning to the local land office the homestead application and affidavit of Wright, and your office held the entry of Maher for cancellation, and allowed the homestead entry, No. 11,655, made by Wright on August 13, 1886, to remain intact.

From the foregoing, it is quite evident that Wright's entry should not have been allowed until the final determination of the validity of Maher's entry. *James et al. v. Nolan* (5 L. D., 526).

From an examination of the record, I am not fully satisfied that Wright has shown such a superior claim to the land as would warrant the cancellation of Maher's said entry. Unquestionably, under the rulings of the Department in the case of Turi O. Simle (5 L. D., 173), if the first entry of Maher had been allowed to remain of record, there would have been no error. But Maher accepted the ruling of your office, canceling his entry without prejudice, and the rights of the parties must be determined upon the record as presented.

It is shown that Wright was not living upon the land at the date of hearing, namely February 17, 1885, and had not been living upon said tract since August 26, 1884.

The motion of Maher to dismiss said proceedings having been sustained by the local office, I am of the opinion that Maher should have an opportunity to offer testimony in support of his claim, and also should be allowed to show the invalidity of Wright's said entry. John W. Hoffman (5 L. D., 1).

The record will be returned to the local officers, and they should be advised to permit Maher to introduce his evidence, after due notice to Wright, who will also be allowed to offer evidence in rebuttal, and upon the receipt of said testimony and the report of the local officers upon the whole evidence offered, you will re-adjudicate the case.

The decision of your office is modified accordingly.

FINAL PROOF—ADVERSE CLAIM—REHEARING.

WRIGHT v. BRABANDER.

One who offers final proof in the presence of an adverse claim must abide the result thereof, and submit to an order of cancellation if the evidence shows non-compliance with the law.

On application for rehearing in such a case, evidence showing compliance with law after the submission of final proof would not warrant a modification of the judgment of cancellation.

Secretary Vilas to Commissioner Stockslager, June 4, 1888.

Charles Brabander has filed a motion for review of departmental decision of March 17, 1888 (not reported), affirming the decision of your office of February 9, 1886, rejecting the final proof and holding for cancellation his pre-emption filing for the SE. $\frac{1}{4}$, Sec. 15, T. 102 N., R. 66 W., Mitchell, Dakota.

A rehearing is asked upon the ground (contained in his corroborated affidavit attached to said motion) that, subsequent to his tender of final proof in February, 1885, he continued to reside on the land until September 18, 1885, when he was compelled to move on a homestead he had entered and that since said date he has made the following improvements on the land: "six acres of breaking, cleared eight acres from stone, and have partially dug a well, and have cropped said land every year since date of entry to this date."

Brabander offered final proof upon his claim February 18 1885, against which Wright, who had made homestead entry of the same tract protested, and testimony was submitted thereon

The action of your office was affirmed upon the ground that the evidence offered by Brabander on final proof is clearly not of such a character as to warrant the conclusion that he has in good faith complied with the requirements of law, and that having advertised his readiness to make final proof he was bound, in the face of an adverse claim, to make such a showing as would warrant a finding in his favor as a

settler in good faith under the pre-emption law. The Department held upon the authority of *Wade v. Meier* (6 L. D., 308), that in such case he must stand or fall by the record made by his final proof.

The ground urged in support of a rehearing, is that he continued to occupy the tract from the date of final proof in February, 1885, until September 1885, when he moved upon land he had entered under the homestead law, but he does not allege any ground of error in the decision of the Department holding that he has failed to comply with the law prior to the tender of final proof, and as his rights were made to depend upon a compliance with the law prior to that date, in the face of an adverse claim, I do not see how a subsequent compliance could affect the decision of the Department.

If a rehearing was granted, it could only be for the purpose of allowing Brabander to show compliance with the law up to the date of such hearing, and as he has left the pre-emption claim and moved upon his homestead, I do not see how his pre-emption right could be restored.

The fact that Wright has or has not complied with the requirements of the homestead law, cannot affect the claim of Brabander. That is a question between Wright and the government that will be determined when he offers his final proof.

The motion is denied.

MINERAL LAND—BRICK CLAY.

DUNLUCE PLACER MINE.

A deposit of "brick clay" will not warrant the classification of land as mineral, or entry thereof as a placer claim.

Secretary Vilas to Commissioner Stockslager, June 4, 1888.

F. W. Weston, one of the applicants for patent for the above stated claim, has filed application for certification of the record alleging that notice of your decision of February 21, 1887, holding for cancellation said entry was not received by him until after the expiration of the time allowed for appeal.

It does not appear from the application that he offered to appeal from your decision after receiving notice or that you declined to receive and transmit an appeal. For this reason alone his application might properly be dismissed.

But from the case made by the application and from your decision of February 21, a copy of which is attached as an exhibit, no reason is shown why the decision of your office should be reversed.

From said decision it appears that the entry was located for the valuable deposit of "brick clay" within its boundaries and that it is undoubtedly more valuable as a "clay placer" than for any other purpose.

This statement of the case is corroborated by the application for cer-

tiorari, and there is no statement or pretense that it is otherwise valuable or contains minerals of any character.

I concur in the opinion of your office that the land embraced in the entry cannot be properly classified as mineral land and is not subject to entry as a placer claim under the mining laws.

The application is denied.

TIMBER CULTURE ENTRY—APPLICATION AND PRELIMINARY AFFIDAVIT.

LEWIS HOLMES.

The execution of the application and preliminary affidavit outside of the Territory in which the land is situated renders a timber culture entry voidable, but not void, and where good faith appears, the applicant may be permitted, in the absence of an adverse claim, to file a new application and affidavit executed according to law.

Secretary Vilas to Commissioner Stockslager, June 4, 1888.

I have considered the appeal of Lewis Holmes from the decision of your office, dated December 13, 1886, rescinding the decision of your office, dated November 9, 1886, allowing said Holmes to make a second timber culture entry of the NE. $\frac{1}{4}$ of Sec. 18, T. 9, R. 40, North Platte land district, Nebraska.

The record shows that said Holmes made timber culture entry, No. 5489, of said tract on October 11, 1884, and that he signed the affidavit outside of said land district and in the State of Illinois.

October 18, 1886, your office, upon the report of a special agent that the affidavit and application were signed outside of the land district, held said entry for cancellation.

The special agent reported that said entry was made in good faith by the entryman in ignorance of the law, and recommended that the entry be canceled, "unless claimant perfects same by filing proper affidavit within a reasonable time."

On November 9, 1886, your office considered the application of the entryman, that he be permitted to perfect said entry by submitting a new and properly executed affidavit, and advised the local officers that the application could not be allowed, "in view of the illegality of the entry *ab initio*." But your office held that, if the entryman so desired, after the cancellation of said entry, he would be permitted to make a timber culture entry "*de novo* for said tract."

On December 13, 1886, your office rescinded said decision of November 9, 1886, on the ground that the same was inadvertently made, and also because the law excuses the ignorance of no one.

Since there is no adverse claim, and the evidence shows that the entryman acted in good faith in making said entry, I am of the opinion that the claimant should be permitted to file new affidavit and application, executed according to law.

Said entry was not absolutely void, only voidable. Such has been the express ruling of the Department. *Ferguson v. Hoff* (4 L. D., 491); *Roe v. Schang* (5 id., 394).

The decision of your office is modified in accordance with the views herein expressed.

PRACTICE—PROTESTANT—CONTESTANT; COMMUTATION.

MARTIN v. BARKER.

A clear distinction exists between a "protestant" and a "contestant;" but one who initiates proceedings as a protestant, may, in the course of subsequent proceedings, by complying with the law and regulations become a contestant and secure the rights accorded thereto by the statute.

A party who appears to object against the allowance of an entry, but declines to pay the costs of a contest, is a protestant, and cannot assert the rights of a contestant.

The privilege of submitting new proof within the life of his entry, which may be accorded to a commuting homesteader who has failed to show compliance with law, but is not chargeable with bad faith, is not precluded by the appearance of a protestant who fails to establish an adverse claim.

Secretary Vilas to Commissioner Stockslager, June 4, 1888.

I have considered the case of John Martin v. John M. Barker, involving homestead entry No. 5492, for the SE. $\frac{1}{4}$ of Sec. 8, T. 21 N., R. 4 E., Olympia district, Washington Territory.

On February 24, 1885, Barker published notice of his intention to make commutation proof on April 14, 1885, before the judge (or, in his absence, the clerk) of the district court at Seattle.

On April 4, 1885, Martin filed an affidavit of contest (dated March 27, 1885,) in the local office, alleging abandonment and failure to establish residence. On this affidavit is endorsed: "Awaiting \$10 contest fees; no cash, April 4, 1885."

On April 14, the entryman appeared before the judge of the district court at Seattle, where his own testimony and that of two of his advertised witnesses was taken. Martin appeared at the same place in opposition to the entry, and by agreement the cross-examination of the entryman's witnesses, and the examination of witnesses in opposition thereto, was arranged to take place before the local officers on the 7th of May ensuing.

The examination before the local office occupied May 7, 8, and 15, 1885. The local officers (May 22, 1885,) found as follows:

In the matter of the final proof of John W. Barker, Hd. No. 5492—John Martin, Protestant: May 22, 1885: John M. Barker is a married man with three children. He settled on the land in question on December 16, 1883, built his house about the middle of January, 1884, and then established his residence on the land. His entire improvements consist of a cabin eighteen by eighteen feet, with a shake

roof, one door, no window and no chimney, with a hole in the roof to let out the smoke; a little over an acre slashed and burned over, but not cleared nor in any manner cultivated, with the exception of a small garden-spot whereon he raised a few bushels of potatoes, and a very small amount of other vegetables among the stumps and roots; and a well four or five feet deep. The total value of these improvements is variously estimated at from seventy-five to five hundred dollars; but a fair preponderance of the evidence shows the same to be worth not more than one hundred and seventy-five dollars. A period of six months elapsed from the time of Barker's first settlement to the date of his making final proof; and his own testimony is to the effect that, counting the time employed in going to and from the land, he was on the same about one-fifth of the time. During all this period his family resided in Tacoma, where he has property worth about twelve hundred dollars. His cabin is shown to be hardly habitable; and his excuse for his failure to live upon the land with his family is the delicate health of his wife and the sickness of one of their children. It is evident that Mr. Barker has made his home in Tacoma during all this time, that he has only made visits to his homestead claim, and that the improvements are of a meager character. We do not think he has complied with the homestead law as to residence, cultivation, and improvement; and as he has some five years yet within which to manifest his good faith by living upon and improving the land, we reject his final proofs, subject to his right of appeal within thirty days.

Martin (after waiting a little over a month—as he says, for Barker to appeal) filed a motion for review of the above decision, on the ground (mainly) that therein the right of appeal therefrom had been restricted to Barker. Thereupon the local officers (July 23, 1885,) allowed Martin thirty days within which to appeal; and he appealed (August 14, 1885,) to your office—which (March 4, 1886,) rendered a decision concluding as follows:

I agree with you that the evidence adduced shows failure on the part of the entryman to comply with the requirements of the homestead law; but I do not think that the reason assigned for such failure is sufficient to justify his being allowed additional time within which to establish a residence on the land. Your decision is modified to that extent, and homestead entry No. 5492 is hereby held for cancellation.

Prior to the rendition of your office decision above cited—to wit, June 21, 1885—Barker, in pursuance of the decision of the local officers allowing him opportunity to “manifest his good faith by living upon and improving the land” thereafter, moved his family to said land, and since the date last named he has (according to his corroborated affidavit on file in the case) continued to reside upon and improve said land.

Upon receipt of your office decision (of March 4, 1886, *supra*,) adverse to him, Barker applied for a rehearing—mainly “For the the reason that, through mistake as to the status of the case, no effort was made to show fully the facts of the case.”

Barker's application for a rehearing was denied by your office, which said (July 16, 1886):

The reasons assigned are not such as to warrant a review or rehearing in the case. Barker having published notice of his intention to

make final proof on his homestead entry, was bound to appear on the day specified, prepared to prove all the facts as to residence on and cultivation of the land embraced in his entry; further, the taking of testimony having by mutual consent been postponed, Barker can not now plead ignorance of the status of the case.

From said decisions of your office (of March 4 and July 16, 1886,) the entryman appeals, on these grounds:

"1. The Commissioner erred in overruling the decision of the register and receiver, no appeal having been taken therefrom;

"2. In recognizing John Martin as a contestant, who consented to be recognized by the register and receiver as a protestant or informer only;

"3. In denying Barker's motion for a rehearing."

In explanation of the first assignment of error it may be said that counsel for claimant contends that Martin's appeal of August 14, 1885, being taken so long out of time, was in no proper sense of the term an appeal; while counsel for Martin contends that, not having been notified that an opportunity to appeal was accorded him (as directed by Rule 44 of Practice), he is not in laches on account of this delay.

As to the second assignment of error: Between a "protestant" and a "contestant" a clear distinction exists (see *McCracken v. Porter*, 3 L. D., 399). It is not denied that a person who initiates proceedings against an entry merely as a protestant, objector, or friend of the government, may in the course of subsequent proceedings, by complying with the rules and regulations for such cases made and provided by the Department, become a contestant. It does not appear, however, that a protestant can be made a contestant by compulsion, in opposition to his own expressed desire, and without complying with the conditions prescribed by the Department.

It is clear that Martin did not come into the case at bar originally as a contestant. Rule 54 of Practice says:

Parties contesting pre-emption, homestead, or timber-culture entries, and claiming preference right of entry, under the second section of the act of May 14, 1880 (21 Stat., 140), must pay the costs of contest.

On the first day of the hearing before the local officers (May 7, 1885,) the following proceedings appear of record:

Comes now the homestead claimant herein, by his attorneys, and moves by written motion that the costs in the above entitled matter be taxed to the protestant herein And the register and receiver overrule said motion, on the ground that this action is not a contest, and therefore does not come within the rule laid down for the taxation of costs in contests against homestead entries. And it is ordered that each party herein pay the costs made by himself; To which ruling the claimant by counsel objects and excepts.

It is clear that at this point in the proceedings Martin not only acquiesced in the holding of the local officers that the action before them was not a contest, but persistently refused to fulfill the conditions pre-

scribed by the Department as indispensable to constitute him a contestant.

This position was recognized by the local officers when they, on May 22, 1885, rendered their decision, which began by entitling Martin the "Protestant," and ended by ignoring any preference right of entry which he if a contestant might have had.

To transform Martin from a protestant into a contestant required something more than mere lapse of time; some affirmative action or change of attitude on his part was necessary.

The next step taken by Martin was on July 17, 1885, when he filed a motion for review of the local officers decision of May 22, 1885. But nearly a month prior to the filing of said motion for review—to wit, on June 21, 1885—the entryman, in prompt pursuance of the decision of the local officers, had removed with his family to the tract in controversy, and he and they have resided there continuously ever since.

It is clear that Martin had not, prior to the last named date, acquired any rights as against the entryman; hence the question at issue is one solely between the latter and the government.

Such being the case, I am of the opinion, in view of the facts herein set forth, that Barker's entry should not be canceled, but that he should be allowed to make new proof at any time hereafter within the lifetime of his entry.

Your decision is accordingly reversed.

PRACTICE—ACT OF JUNE 15, 1880—SETTLEMENT RIGHTS.

MALCOMB v. WILLIAMS.

A cash entry under section two of the act of June 15, 1880, having been allowed, should not be canceled on an *ex parte* allegation of a prior adverse settlement right, but a hearing should be ordered to determine the rights of the parties.

Secretary Vilas to Commissioner Stockslager, June 4, 1888.

I have considered the case of Thomas Malcomb v. William Williams, on appeal by the former from your office decision of July 9, 1886, holding for cancellation his cash entry for the NE. $\frac{1}{4}$ of Sec. 4, T. 20 S., R. 23 W., Wa Keeney, Kansas, land district.

Malcomb made homestead entry for said tract April 30, 1879, which was canceled November 17, 1885, upon contest initiated by one Anderson Hoel. On December 23, 1885, Malcomb applied, and was allowed, to purchase said land under the provisions of the second section of the act of June 15, 1880 (21 Stat., 237).

On March 5, 1886, Williams presented his pre-emption declaratory statement, alleging settlement on said land December 11, 1885, which was rejected by the local officers because of Malcomb's purchase. From that action Williams appealed, alleging the land to have been subject

to appropriation at the date of his settlement. On July 9, 1886, your office sustained the appeal, directed that Williams's declaratory statement be allowed to go of record, and held Malcomb's entry for cancellation. From that decision Malcomb appealed, alleging that he examined said tract on the day he made out his application to purchase, December 19, 1885, and found no improvements there, nor any indication of a settlement thereon.

Malcomb's application was allowed by the local officers, the purchase money paid and his entry made of record, and such entry should not have been canceled on the ex-parte statements of the pre-emptor without affording the entryman an opportunity to be heard. The successful contestant in this case failed to exercise his preference right of entry, within the thirty days allowed him, and after the expiration of that period the original homestead claimant was under the decisions of this Department entitled to purchase under the act of June 15, 1880, provided said purchase did "in no wise interfere with the rights or claims of others who may have subsequently entered such lands under the homestead laws." Under the circumstances a hearing should have been ordered to determine the rights of these parties under their respective claims, and the case is returned to your office, in order that such hearing may now be had, and the claims of these parties determined in accordance with the rules and regulations of this Department.

Your said office decision is accordingly modified.

Your office, by letter of June 18, 1887, transmitted other papers in said case, which upon examination are found to be the papers in final proof made by Williams, September 11, 1886, under his pre-emption claim, and rejected by the local officers September 29, 1886, because of Malcomb's cash entry. The question of Williams' right to file for said land being undetermined, said proof was prematurely made, and therefore properly rejected by the local officers.

PRE-EMPTION—SECTION 2260, R. S.—SECOND FILING.

MARTIN GRAHAM.

The right of pre-emption is denied to one who quits or abandons his residence on his own land to reside on the public land in the same State or Territory; and a subsequent sale of the homestead, from which he had removed, would not operate to relieve the settler from the inhibition.

In such a case a second filing for the same tract, with settlement alleged after the sale of the homestead, cannot be allowed, as the allegation with respect to settlement, would be untrue, and the filing a palpable evasion of the statute.

Secretary Vilas to Commissioner Stockslager, June 4, 1888.

Martin Graham filed his declaratory statement for the E. $\frac{1}{2}$ of SE. $\frac{1}{4}$ Sec. 29, and E. $\frac{1}{2}$ of NE. $\frac{1}{4}$ Sec. 32, T. 22 S., R. 44, Pueblo land district, Colorado. Final proof was offered January 2, 1886, and rejected

by the local office January 21, 1836, upon the ground that claimant removed from his homestead to initiate his pre-emption right.

Claimant having been informed about December 10, 1835, that his proceeding was contrary to law, he sold his homestead December 26th to one Patrick Nolan for \$1500, and on February 3, 1836, claimant applied to file a second declaratory statement for the same land, alleging settlement December 1, 1835, which was rejected on account of the previous filing made by him.

From this action claimant appealed, and on the 5th of May, 1836, you affirmed the action of the local office, and from this decision claimant appeals to the Secretary of the Interior.

Prior to making his pre-emption settlement and filing his declaratory statement, claimant had made homestead entry and received his final certificate for the NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ and N. $\frac{1}{2}$ of SW. $\frac{1}{4}$ Sec. 29, and NE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ Sec. 30, in said township 22 S., range 44 W., in said Pueblo land district, Colorado, June 7, 1831. He moved from his said homestead directly upon his pre-emption, where he established settlement March 29, 1833. The claimant alleges that at the time he made said pre-emption settlement he supposed he was acting in accordance with the requirements of the pre-emption law; that being advised that his settlement was of doubtful legality, he immediately sought the nearest available source of information by inquiring of one John W. Jay, the clerk of the district court of Bent county, Colorado, who informed him that there was no doubt about claimant's right to make final proof on the land, but still being in doubt he caused his said informant to submit the question to the local land office, which was accordingly done, by letter, under date of December 7, 1835, as follows:

" WEST LAS ANIMAS, *December 7, 1835.*

WM. BAYARD, Esq.,—

Will you kindly answer me this question and oblige:

A resident of this county made a homestead entry after a residence of five years; he made final proof and a patent was issued; he then made a pre-emption filing, and has advertised to make final proof, but he now thinks that after exhausting his homestead, he cannot prove up on his pre-emption, because he was necessarily obliged to leave his homestead to live on his pre-emption. Is there anything under the circumstances to prevent him from making his proof?

Respectfully,

JOHN W. JAY."

To this letter the register replied as follows:

" Mr. JAY:

Referring to the within:

Settlers frequently make the mistake of this party. Sec. 2260, R. S., does not allow the pre-right to those who *move from a residence on land of their own* to settle on the public domain.

This man came in conflict with the law; but it is quite probable, judging from previous practice of the Department, that in case he executes

a *bona fide* sale or transfer of the homestead property, he will be permitted to make his pre-emption proof.

We have favorably passed such cases.

The facts, at final proof, must be explained fully by supplementary affidavit.

Very respectfully,

(Signed)

WM. BAYARD,
Register.

PUEBLO, Dec. 8, 1885."

Acting upon this advice he sold and conveyed his said homestead tract to one Patrick Nolan for \$1,500, December 26, 1885, and proceeded on January 2, 1886, pursuant to due notice to offer his final pre-emption proof—in which the foregoing facts were made to appear, the claimant making no effort at concealment, but relying upon his supposed legal right and the advice of the local officer. The local office, however, rejected his proof, which appears sufficient in all other respects, and shows improvements to the value of \$1,000, upon the sole ground of his removal from his homestead upon the pre-emption claim, and he, therefore, not being a qualified pre-emptor, under the second subdivision of section 2260 of the pre-emption law.

The decision of the local office was unquestionably right. The statute declares plainly that "no person who quits or abandons his residence on his own land to reside on the public land in the same State or Territory" shall acquire any right of pre-emption under the law. This was just what Graham did, and having done it, no subsequent sale of the homestead made any difference with the case. Nor did the erroneous advice of the register that he could save himself affect it, although he alleges that upon that advice he sold his homestead. At the time he made this sale, however, he had been living upon the land which he seeks to pre-empt, during nearly or quite the period required by the rules to entitle him to complete the purchase. He did not attempt the pre-emption by reason of the advice of the officers, but only attempted to cure his want of qualification caused by the removal from his own land. No advice could enable him to cure that. To file a second pre-emption declaratory statement, alleging a settlement at some date after the sale of the homestead would be to make an untrue statement in regard to the actual time of settlement; and to permit it to be done by the Department would be to wink at a palpable evasion of the statute.

Like many other similar cases which have come to my attention, this is a hard one because the claimant was unquestionably sincere in the belief of his right under the statute to secure the land by pre-emption, and has settled and resided thereon and improved it in good faith, and made a large expenditure upon it. If there were any privilege of equitable interposition he might be relieved by the Department. As it is, the power of relief is in Congress alone.

Your decision is affirmed.

FINAL PROOF—PUBLICATION—TRANSFeree.

UNITED STATES *v.* CLARK ET AL.

Where through no fault of the claimant the land was misdescribed in the published notice of final proof, and subsequently alienated, it appearing that the whereabouts of the entryman cannot be ascertained, further publication of notice, calling on any one to show cause why the proof submitted should not be accepted, may be made by the transferee, and, in the absence of protest, said proof may be accepted as made.

Secretary Vilas to Commissioner Stockalager, June 4, 1888.

I have considered the case of the United States *v.* Charles M. Clark entryman, A. S. Bradley grantee, involving the pre-emption cash entry No. 2, of said Clark on the SW. $\frac{1}{4}$ of SE. $\frac{1}{4}$, S. $\frac{1}{2}$ of SW. $\frac{1}{4}$, Sec. 9, SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$, Sec. 8, T. 34 N., R. 8 W., Durango district, Colorado, on appeal by said Bradley from the decision of your office of October 6, 1886, denying his application to have the papers in said case certified to this Department for review.

Clark filed declaratory statement for said land July 6, 1882, and on November 28 of that year made pre-emption proof and cash entry thereon.

August 3, 1883, Bradley purchased from Clark the one hundred and twenty acres of said land in said Sec. 9, with the improvements thereon, for the sum of \$1200. The proof as made embraced said land and showed full compliance with the law in good faith on the part of Clark, but, it appearing that the land had been misdescribed as being in "Section 8" instead of "Section 9" in the original notice by publication for final proof, your office, by letter of June 4, 1885, required republication and new proof to be made by Clark.

The mistake in the description was made by the publisher and without fault on the part of Clark, and Clark had left the State of Colorado more than a year before said requirement of republication and new proof was made, and his post-office address could not be ascertained, and service of said requirement could not be had upon him. These facts, and also, the purchase by Bradley being made known, it was again held by your office in letter of November 24, 1885, that new publication and proof must be made by the *pre-emptor*, Clark.

On January 8, 1886, Bradley made application to your office, "that in view of the fact that service cannot be had upon Clark . . . the register be directed to cause to be published for the full period of thirty days . . . notice setting forth that Charles M. Clark did on November 28, 1882, before the register and receiver of the United States Land Office at Durango, Colorado, make final proof for said land, and requiring any adverse claimant or other person knowing of any reason why such proof should not be accepted, to appear at said land office and make the same known on or before the expiration of said thirty days."

Your office, however, still adhered to its original ruling, that new publication and proof must be made by the *pre-emptor*, and in default

thereof, on June 10, 1886, held the entry for cancellation. Thereupon Bradley applied to your office to have the papers in the case certified to this Department for review, and your office, in the decision of October 6, 1886, refused this application, holding "that there exists no provision in the Rules of Practice for such certification, but that as assignee of the original claimant Bradley may have the right of appeal" from the ruling of your office requiring the new proof and publication to be made by Clark and holding the entry for cancellation. Bradley, instead of appealing as suggested by your office, appealed from the decision of your office denying his application to have the papers certified to this Department for review.

The decision of your office upon Bradley's said application was correct. Bradley, as grantee of Clark, had the right of appeal and should have appealed from the action of your office requiring new proof and publication to be made by the pre-emptor, and holding the entry for cancellation in default thereof.

But all the papers have been transmitted to this Department and I differ from the conclusion attained by your office on the main question involved. Clark gave to the register the notice required by the statute correctly describing the land. The fault was not of the pre-emptor but of the publisher, who acts under direction of the register (20 Stat., 472,) and was, therefore, chargeable to the officer of the government, rather than to the pre-emptor. He did all the statute required of him and his title ought not to be destroyed by the failure of the land officers. *Lytle v. Arkansas* (9 How., 333); *Yosemite Valley Case* (15 Wall., 20).

It is evident, moreover, that to require new proof and publication to be made by the pre-emptor, when, as in this case, he can not be found and service of this requirement can not be had upon him, is, in effect, the denial to his grantee of any right to remedy the otherwise fatal mistake made by the publisher in the description of the land. The decisions of this Department recognize the right of a grantee, after the issue of final certificate, to show his grantor has complied with the requirements of the law, and thereby acquired a good title to the land. (*John C. Featherspil*, 4 L. D., 570).

Under the circumstances, the notice proposed by his grantee appears sufficient to fully protect the government from any harm which may be thought to have resulted from the mistake in the description, and is quite as much as ought to be required to correct a fault of the land officers only.

I am of the opinion that your office should have directed the register to make publication of the notice requested by Bradley as above set forth, and in the exercise of my duty of supervision, you are accordingly so instructed, and if no objection is filed to said entry within the time prescribed in said notice, the proof submitted by Clark will be accepted as final proof.

The decision of your office, requiring new proof and publication to be made by Clark and holding the entry for cancellation, is reversed.

PRACTICE—APPEAL—RULE 81.

D. A. CLEMENT.

The opinion of the Commissioner of the General Land Office, furnished in response to an inquiry with respect to the authority of certain officers in final proof proceedings, is not a decision "relating to the disposal of public lands," and no appeal will lie therefrom under Rule 81 of Practice.

Secretary Vilas to Commissioner Stockslager, June 5, 1888.

In letter "A" of October 11, 1886, written in reply to a letter from D. A. Clement, clerk of the fourth judicial district of Washington Territory, dated September 25, 1886, you stated that as the laws of said Territory made the probate court a court of record and provided that the judge may act as clerk or appoint a clerk, the probate judge is an officer before whom proof can lawfully be made under the provisions of the acts of March 3, 1877 (19 Stat., 403), and June 9, 1880 (21 Stat., 169).

By letter of February 15, 1887, you transmit what you designate as "the appeal" of Mr. Clement from your opinion aforesaid.

I decline to treat the paper of Mr. Clement as an appeal. In the case of W. A. Stone (3 C. L. O., 3), it was held that "no appeal can be entertained from a reply by you to a mere letter of inquiry."

Rule 81 of the Rules of Practice, relating to appeals, is as follows :

An appeal may be taken from the decision of the Commissioner of the General Land Office to the Secretary of the Interior upon any question relating to the disposal of the public lands and to private land claims, except in case of interlocutory orders and decisions, and orders for hearing or other matter resting in the discretion of the Commissioner. Decisions and orders forming the above exception will be noted in the record, and will be considered by the Secretary on review in case an appeal upon the merits be finally allowed.

Your letter of October 11, 1886, from which Mr. Clement desires to appeal, is not a decision "relating to the disposal of public lands," and therefore no appeal from it will lie under Rule 81.

TIMBER CULTURE ENTRY—"DEVOID OF TIMBER."

L. W. WILLIS.

An application to make timber culture entry must be rejected if it does not appear that the section is devoid of timber.

The case of James Spencer, in so far as it allowed the application under the departmental rule existing at the time when said application was made, will not be followed hereafter.

Secretary Vilas to Commissioner Stockslager, June 8, 1888.

I have considered the appeal of L. W. Willis from the decision of your office, dated January 22, 1886, affirming the action of the local land officers rejecting his timber culture application to enter the NE. $\frac{1}{4}$

NW. $\frac{1}{4}$, W. $\frac{1}{2}$ NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 18, T. 2 S., R. 39 W., Oberlin land district, Kansas.

Said application was rejected for the reason that the township plat of survey on file in the local office showed that said section had timber thereon, and the evidence failed to show that the section was composed exclusively of prairie land or other lands naturally devoid of timber.

This case comes clearly within the ruling of the Department in the case of James Spencer (6 L. D., 217), and upon the affidavit of the entryman, which does not show that, in the language of the statute, the section is "devoid of timber," the application to enter was properly rejected. I cannot follow the case of Spencer, however, in holding that because at the time the application to enter was made at the local office, another opinion was held at the Department, therefore this entry should be now allowed. Had the local land officers received the entry and thus have induced the entryman to proceed with the expenditure of money and labor which the law requires in the prosecution of a timber culture claim, the case might have been very different. But the entry was rejected, rejected according to law, and there is no ground upon which the Department ought now to decide contrary to the law to be found in the fact that another opinion was at one time entertained in respect to the meaning of the statute. On this point the case of Spencer cannot be supported hereafter.

TIMBER CULTURE CONTEST—GROWTH OF TREES.

SANFORD v. BURBANK.

The fact that the claimant does not have, at the date of hearing, the number of trees required by law growing on the land, is not of itself a sufficient ground for the cancellation of his entry.

Secretary Vilas to Commissioner Stockslager, June 8, 1888.

I have considered the case of John W. Sanford *v.* John A. Burbank, involving timber culture entry, No. 1851, for the SE. $\frac{1}{4}$ of Sec. 30, T. 103 N., R. 71 W., Mitchell land district, Dakota.

The record shows that said John A. Burbank made the entry above mentioned on the 20th day of August, 1879, and on February 20, 1885, contest was commenced against the same by said Sanford, alleging, in substance, that said Burbank has wholly failed and neglected to have growing upon the land at the present time the number of trees required by law; that at the present time there are no living trees upon the tract; that claimant has wholly failed and neglected to cultivate said tract in any manner during the year 1884, and that, if at any time trees, seeds, or cuttings have been planted upon said tract, the said trees, seeds or cuttings have died through want of proper planting, and care and cultivation of the same thereafter. His affidavit of contest was accompanied by an application to enter the land.

A hearing was thereupon ordered by the local office, to be had April 29, 1885, and one George L. McKay was appointed a commissioner to take the testimony in the case, the same to be taken at Chamberlain, Dakota, on the 22d day of April, 1885. Notice was given by publication, and on the day last named both parties appeared before said commissioner, as required by the notice. The testimony was thereupon commenced, and being completed on the day following, was submitted to the local officers for action, on the day set for the hearing, as above stated; and upon consideration thereof, they agreed in opinion that "the charges are sustained, and the contestant is entitled to judgment."

Claimant appealed from said decision, and by letter "C" of your office, under date of April 22, 1886, your predecessor in passing upon the said appeal, held "that the allegations of contest are not sustained." "That the claimant has acted in good faith; and has made all reasonable efforts to comply with the law, and whatever failure there may appear to have been, was the result of circumstances practically beyond his control; that therefore his entry should not be canceled." The decision of the local office was thereupon reversed and the said contest dismissed.

From this latter decision contestant appealed.

A review of the testimony shows that during the season of 1880 claimant procured ten acres of the tract to be broken and had the same cultivated in the year 1881; and in the spring of 1882 the ten acres thus broken and cultivated were planted to tree seeds. That in the fall of 1882 the seeds planted as above having failed to come up, the ground was again plowed, and in part planted to trees that fall, the residue being planted in the spring of 1883. Only a small portion of these trees lived. The cause of their failure to grow does not clearly appear, but it would seem from the testimony that those planted in the fall of 1882, were injured by the severity of the following winter, and it is shown that the season of 1883 was a very unfavorable one, in that locality, for the growth of trees. It appears that an extra effort was made to procure a stock of good trees; and whatever the cause of the failure, it was certainly not the negligence or intention of claimant. As to the cultivation of the ground in the year 1884, it is shown by all the witnesses having knowledge of the fact, that such cultivation was done, and, I think, by a great preponderance of the testimony, that it was well done.

There is nothing in the record showing the least indication of want of good faith on the part of claimant, on the contrary he appears to have made all reasonable efforts to fully comply with the law. He is a resident of the State of Indiana, and, in addition to employing agents to look after and attend to the land for him, he made several trips to Dakota to see that the work of planting and cultivation was properly done, and for the work done, and seeds and trees planted, he

appears to have expended the sum of about \$240. Finding that the trees last planted were likely to prove almost an entire failure, he again made arrangements to have the ground prepared and replanted to trees, and at the time of the hearing had in part paid for the same.

The fact that claimant did not have at the date of the hearing the number of trees required by law growing on the land, is not of itself a sufficient ground for the cancellation of his entry.

Upon the whole case, I am of the opinion that there is no error in your said decision, and the same is therefore affirmed.

PRACTICE—APPEAL.

M. H. DECELLE.

The unverified statement of an attorney that notice of a decision was not received, as shown by the record, is not sufficient to warrant the allowance of an appeal more than a year after the expiration of the time allowed therefor.

Secretary Vilas to Commissioner Stockslager, June 9, 1888.

I have considered the appeal of Moses H. DeCelle from your office decision of November, 1885 rejecting his final proof and holding for cancellation his homestead entry for the SE. $\frac{1}{4}$, Sec. 25, T. 105 N., R. 53 W., Mitchell, Dakota land district.

DeCelle made homestead entry for said tract March 26, 1830 and made final proof thereunder April 30, 1835, before the clerk of the district court for Lake county, which proof was by the local officers approved and final certificate issued bearing date of May 16, 1885.

Upon examination of said proof in your office it was held that it was unsatisfactory and was therefore rejected and the entry held for cancellation by letter of November 9, 1885.

The local officers by letter of April 8, 1886 reported that the claimant had been duly notified of said decision and that no response had been received. By your office letter of July 9, 1886, the local officers were informed that said entry was canceled and were directed to note the same and advise the party thereof.

On December 7, 1886, Chas. B. Kennedy, as attorney for the claimant filed in the local office an appeal from your office decision of November 9, 1885.

In this appeal it is said,

I would further state that claimant, Moses H. DeCelle, had no notice until about a month ago of the contents of said Commissioner's letter "C" of November 9, 1885, the notice having been sent to the wrong post-office and being uncalled for was sent to the Dead Letter Office and then returned to the Mitchell land office, and about a month ago got into the hands of claimant, all of which appears by the envelope containing said notice which is hereto attached.

The notice sent in said envelope is not filed, and the envelope itself shows that it was mailed in the first instance at Mitchell on July 19, 1886, just ten days after your office letter directing the local officers to inform the claimant of the final cancellation of his entry, and presumably contained that notice rather than a notice of your office decision of November 9, 1885; notice of which decision the local officers reported April 8, 1886, had been given the claimant.

The statement noted above, which is all that is submitted upon the question of notice of the decision, was not made by the claimant in person although he is the only one who could have personal knowledge of the facts, but is the voluntary statement of the attorney who could not have personal knowledge of the facts, and is not supported by the oath of any one.

A party to entitle himself to an appeal after the lapse of more than a year after the date of the decision complained of, and in the presence of the report of the local officers that he had been duly notified of that decision, is required to show by more than the unverified and uncorroborated statement of his attorney, that no notice of such decision had been received by him until within sixty days of the filing of his appeal. The claimant here has not set up such facts as would entitle him to an appeal at the late date he asked for it, nor are such facts as he does set up properly presented and therefore his appeal is hereby dismissed.

FINAL PROOF—MORTGAGEE.

GEORGE BROWN.

The final proof on which certificate was issued, being found insufficient, and the entryman having failed to appeal from the Commissioner's decision rejecting said proof and holding the entry for cancellation, the mortgagee of said entryman may submit supplementary proof as to said entryman's compliance with law during the time covered by the final proof.

Secretary Vilas to Commissioner Stockslager, June 9, 1888.

I have considered the appeal of George Brown, mortgagee of Delia Carr, from your office decision holding for cancellation her commuted cash entry for the NE. $\frac{1}{4}$, Sec. 29, T. 116 N., R. 63 W., Huron land district, Dakota.

Delia Carr made homestead entry on the said land May 26, 1884, and commuted the same to cash entry April 4, 1885. Having filed her affidavit and submitted proof, cash certificate was issued thereon.

By your office decision, October 16, 1885, the said entry was held for cancellation because it was considered "an attempt to obtain title to the land through fraud and in evasion of law."

The facts as shown by the proof at its date were as follows: Claimant was a widow, age 48 years, and had one daughter. She bought a re-

linquishment of the claim and the house that was upon it at the time. Her improvements consisted of a frame house, eight by twelve feet, and fifteen acres of breaking, cultivated and sown with oats one season. Improvements valued at \$125. She alleges to have made settlement and established her actual residence on the land September 24, 1884. She further states, that she has not been absent from her claim to exceed thirty days at any one time and then "to visit my daughter." Accompanying the proof is her affidavit which sets out:

That a portion of the time she was absent from the claim at work, that such absence was never to exceed three weeks at any one time, that her means were limited and it was necessary to obtain employment to assist her in making a livelihood; that she has endeavored to cultivate and improve such land as far as her means would admit, and that she has made residence as continuously and shown good faith as far as it was in her power to do so.

Claimant's statements are evasive and strongly tend to prove her bad faith. It cannot be determined by the proof how many times she was absent from or how long she stayed on the land. The proof regarding her residence is vague in the extreme. However the local officers accepted it and cash certificate issued. While therefore, claimant, not having appealed, is barred, the mortgagee should be permitted to submit supplementary proof regarding claimant's residence and good faith prior to the issue of final certificate.

The mortgagee will, therefore, be allowed to submit such supplementary proof within sixty days from notice of this decision. Your decision is accordingly modified.

PRACTICE—PROCEEDINGS ON REPORT OF SPECIAL AGENT.

W. H. H. FINDLEY.

If an entry is held for cancellation on the report of a special agent charging sufficient cause therefor, and the entryman, after due notice, fails to apply for a hearing, such failure is taken as a confession of the charge, and a waiver of any claims to the land; and if the entry is finally canceled, the entryman has no just ground for complaint.

Secretary Vilas to Commissioner Stockslager, June 9, 1888.

On the 25th of April, 1888, you were directed to transmit to this Department the proceedings in the matter of the cancellation of pre-emption cash entry No. 3101 of the NW. $\frac{1}{4}$ of Sec. 10, T. 129 N., R. 65 W., made January 16, 1884, by William H. H. Findley, at the Aberdeen land office, in the Territory of Dakota; and also to "direct the local officers to allow no disposition of said land, until further advised."

On May 16, 1888, your office forwarded the record in said case, and the same has been duly considered.

It appears that said entry was held for cancellation, on February 4, 1887, upon the report of a special agent, dated July 30, 1886.

The local officers, on May 3, 1837, reported that they notified the claimant on February, 10, 1887, by registered letter, that his said entry had been held for cancellation, and that he had failed to take any action thereon. The register and receiver transmitted the registry receipt, showing the delivery of said letter, and your office cancelled said entry on June 10, 1887.

The record further shows that on June 20, 1887, one James McGlynn made homestead entry, No. 6773, of said tract. On August 4, 1887, said Findley, through his attorney, Henry Dickie, applied for a hearing relative to the cancellation of his said entry, alleging that the reason that he had not applied therefor in time was because another attorney, whom he had paid to attend to his case, failed to take the necessary steps, and that, too, without fault on the part of the claimant.

On September 9, 1837, your office refused the application for a hearing, on the ground that the failure of the attorney to apply for a hearing within due time is not a sufficient excuse for his laches.

On March 31, 1888, Hon. James O'Donnell, of the House of Representatives, made inquiry of your office whether certain affidavits were on file in said case, and, if so, whether the case should be re-opened. In response, your office, on April 14, same year, advised Mr. O'Donnell that the affidavits referred to were on file, but they could not be considered as a basis for re-opening the case.

The letter of your office to Mr. O'Donnell, with certain other papers, were filed by him in this Department on April 24th last, requesting that a "full inquiry" be made by the Department relative to the cancellation of said entry.

The final proof and the affidavits filed by the entryman show that he settled upon said tract in good faith, made valuable improvements thereon, and in due time made final proof, and final certificate issued thereon.

Said entry was held for cancellation under the provisions of departmental circular of May 24, 1836, (4 L. D., 545) amending circular of July 31, 1885 (*ibid.*, 503). Said circular provided that :

Hereafter when an entry is so held for cancellation the claimant will be allowed sixty days after due notice in which to apply for a hearing to show cause why the entry should be sustained.

If the entryman, after due notice, applies for a hearing, then the burden of proof is upon the government to show the invalidity of the entry. *George T. Burns* (4 L. D., 62); *U. S. v. Copeland* (5 L. D., 170). But if the entry is so held for cancellation upon the charge of fraud or for any other sufficient cause, and the entryman after being duly notified thereof, fails to apply for a hearing, then such failure is taken as a confession of the charge and held to be a waiver of any claim to the land. The government can not compel the entryman to apply for a hearing, but if a hearing is not applied for within the time allowed after due notice, then the Department holds that the entryman has had his day in

court, and if the entry is finally canceled, the entryman has no just ground of complaint. *Robert Hall et al* (5 L. D., 174).

This ruling does not necessarily conflict with the case of *William E. McIntyre* (6 L. D., 503) wherein the Department held, among other things, that since December 13, 1883, "the practice uniformly requires a hearing before cancellation, after entry has been made," for the Department held that the irregularity in the cancellation of McIntyre's entry was cured by a subsequent hearing, and that the parties in interest "have therefore had their day in court." If a party is duly summoned and fails to attend he can not plead that he has not had his day in court.

The claimant in the case at bar had the opportunity to be heard and failed to appear either in person or by attorney.

Were there no adverse claim, I should feel constrained to grant the application for a hearing; but the letter of your office to Mr. O'Donnell did not state, what now appears from the record, that prior to the application of Findley for a hearing, the land had been entered by another party under the homestead laws.

It is suggested that the reason that said attorney did not apply for a hearing was because he was "bribed." This suggestion is not verified, nor is it intimated that the subsequent entryman was in any way a party thereto, and his rights can not be affected by the neglect of Findley's attorney, unless the subsequent entryman has acted fraudulently.

If it can be duly shown that McGlynn was a party, in any way, to the neglect of said attorney, in not applying for a hearing, then his entry could be canceled and Findley's application for a hearing allowed. But, as the case is now presented, the decision of your office refusing the application for a hearing was correct, and it is hereby affirmed.

PRACTICE—DECISION OF LOCAL OFFICE—NOTICE OF APPEAL.

ARNOLD v. HILDRETH.

The failure of the receiver to concur in, or dissent from the opinion of the register, rendered in a contest, will not operate to deprive the Commissioner of jurisdiction on appeal from the decision of the register.

The death of an entryman, who has secured a favorable decision from the Commissioner in a pending contest, occurring before appeal therefrom, renders it necessary, in case of appeal, to serve notice thereof on the representative of the estate of the deceased entryman, in order to give the Department jurisdiction in the case.

Secretary Vilas to Commissioner Stockslager, June 9, 1888.

Messrs. Wilkes and Wells, of Sioux Falls, Dakota, transferees, have filed an application for a rehearing in the case of *Arnold v. Hildreth*, decided by this Department August 29, 1887 (not reported).

The facts material to a clear understanding of this case are as follows:

On April 27, 1885, Arnold commenced contest against Hildreth's entry, and, on July 9, an opinion was filed by the register in favor of the contestant, but no opinion was filed by the receiver. Before notifying the parties of said action of the register the entryman on July 10, thereafter, applied to purchase under the act of June 15, 1880, which was allowed by the local officers, and cash entry certificate issued. From this action the contestant appealed, and the entire record in the case was transmitted to your office. The Commissioner sustained the action of the local officer allowing such cash entry, from which decision the contestant appealed to the Department.

By decision of August 29, 1887, the Department held upon the authority of *Friese v. Hobson* (4 L. D., 580), that the contest of Arnold could not be defeated by the application of the entryman to purchase under the act of June 15, 1880, nor by the allowance of such entry by the local officers.

In the petition the applicants allege—(1) That Hildreth died in the fall of 1885, shortly after making his cash entry, and they became the purchasers of said land July 29, 1887, and have had no notice of any contest until recently; that they are not advised that any action was taken on behalf of Hildreth or of his heirs, in resistance of the contest after his death, and (2) That no disposition of the contest has been made by the local officers and that it remains undecided at this date.

From an inspection of the record in the case of *Arnold v. Hildreth*, it appears that the register filed his opinion in said case July 9, 1885 in favor of contestant, but the receiver has never filed an opinion. No notice of the register's opinion was served on claimant, but on July 10, 1885, he made application to purchase under the act of June 15, 1880 and his cash entry was allowed and the papers transmitted to your office.

From the allowance of said cash entry Arnold filed his appeal in the local office August 15, 1885.

It is contended by applicants that the contest initiated by Arnold against Hildreth's entry has never been decided, and this view seems to be entertained by the General Land Office. I presume that this contention is based upon the ground that, as no opinion was filed by the receiver in said case, therefore no judgment has been rendered by the local officers on said contest.

Whether the failure of the receiver to file an opinion may be construed either as a concurrence in or dissent from the opinion of the register, it could not affect the right of the land office to act upon said contest, and when Arnold filed an appeal from the action of the local officers allowing the cash entry of Hildreth in the face of a contest upon which testimony had been submitted before the local officers, and an opinion rendered therein in his favor by the register, who transmitted the record

to the General Land Office, he was entitled to the judgment of the Commissioner upon the question whether he had or had not successfully contested the entry, although the receiver failed to file an opinion in said case.

The irregularities of the local officers did not deprive the Commissioner of jurisdiction to pass upon that question, because Arnold's appeal brought up the entire record, and his rights depended upon a determination of that issue. Upon the record of evidence before him taken on the hearing the Commissioner, by virtue of his supervisory power over the disposition of the public lands, had full jurisdiction in the case to render decision thereon as the tribunal of original jurisdiction.

The appeal of Arnold from the action of the local officers was taken prior to the death of Hildreth, and the Commissioner thereby acquired jurisdiction to pass upon the questions presented by said appeal, and to render judgment thereon, but it is alleged by the applicants that, at the time the appeal was filed by Arnold from the decision of the Commissioner, Hildreth was dead and his estate was unrepresented. The death of Hildreth had not been suggested when the decision of the Department of August 29, 1887, was rendered, but it appeared from the record that service of the appeal was made upon Alvin Hildreth, the attorney for the entryman. If it be true, as alleged by the applicants, that Hildreth was dead when said appeal was taken, the Department could not acquire jurisdiction of said appeal, unless said estate was at that time represented, and service of said appeal was made upon the representative of said estate, or the attorney of said representative.

It does not appear that service of the application of Wilkes and Wells has been made upon the contestant, Arnold, or that he has had the opportunity to deny the allegation as to the death of Hildreth. You will therefore return said application to the local officers, and direct them to notify applicants that said application must be served upon Arnold, and upon the return of such service to transmit the same, through your office, to the Department. In the meantime, all action will be suspended in said case.

PRACTICE—MOTION FOR REVIEW.

GEORGE W. MACEY ET AL.

Motions for review should clearly and specifically set forth the grounds of error complained of, and a general allegation of error in matters of law and fact is not sufficient.

Acting Secretary Muldrow to Commissioner Stockslager, June 9, 1888.

Counsel for claimants have filed a motion for review of departmental decision of August 10, 1886 (5 L. D., 52), in the above stated case based on the following grounds, to wit: "On the allegations of error in matters, both of fact and of law, appearing upon the face of the record."

Motions for review should clearly and specifically set forth the grounds of error complained of, and a general allegation that the Department erred in its decision upon the allegations of error in matters both of law and of fact appearing upon the face of the record, is not sufficient. Rule 76, Rules of Practice; *Long v. Knott* (5 L. D., 150).

The motion for review is dismissed.

FINAL PROOF—EQUITABLE ADJUDICATION.

MINA LANDERKIN.

An erroneous description of the land in the final affidavit of the pre-emptor and the testimony of the witnesses, will not render new proof necessary, where the published notice properly described the land, and it appears that the proof submitted was for the tract occupied by said pre-emptor.

In the absence of an adverse claim, an entry may be referred to the Board of Equitable Adjudication where the final proof, through no fault of claimant was not submitted on the day advertised.

Secretary Vilas to Commissioner Stockslager, June 9, 1888.

Mina Landerkin, who filed declaratory statement for the SW. $\frac{1}{4}$, of Section 3, T. 129, R. 61, Aberdeen land district, Dakota, November 13, alleging settlement November 8, 1883, published notice that she would make final proof May 16, 1884.

It appears however, that the proof was not made until May 31, two weeks after the day named. In the pre-emption affidavit of the claimant and in the testimony of her two witnesses, the land claimed is described as being in range 62 whereas it is situated in range 61. In the published notice of intention to make proof and in the testimony of the claimant the number of the range is properly given.

By letter of August 31, 1886, you hold that the error of description renders new proof necessary.

Inasmuch as the tract was properly described in the published notice and as appears from the affidavits of five neighbors, who swear that the proof submitted was for the tract occupied of Mina Landerkin in range 61, it is, I think, unnecessary to require the claimant to undergo the trouble and expense of making new proof on account of what appears to have been a clerical error.

In this case the claimant alleges that her failure to make proof on the day advertised was due to the fact "that her father's team was lost and she and her witnesses were unable to get before the probate judge to take said testimony and that said testimony has been taken at the earliest opportunity possible."

The proof of residence and cultivation is sufficient. Therefore as the local officers accepted proof and payment and as there seems to be no adverse claim, I will not subject the claimant to the trouble and expense of making new proof.

You will please certify the case to the Board of Equitable Adjudication for the action of that tribunal.

Your decision is modified to conform to this decision.

OSAGE ENTRY—ACTUAL SETTLER—RESIDENCE,

McMILLEN v. BLAIR.

Residence for a period of six months next preceding entry is not required by the regulations of the Department in entries under the act of May 23, 1830; but it is essential that bona fide settlement be shown at date of entry.

Secretary Vilas to Commissioner Stockslager, June 9, 1888.

I have considered the case of Robert N. McMillen v. Charles A. Blair, on appeal by the latter, from your office decision of September 17, 1886, rejecting his final proof and holding for cancellation his pre-emption filing for the SE. $\frac{1}{4}$, Sec. 17, T. 28, R. 13 W., Larned, Kansas land district, being part of the Osage Indian trust and diminished reserve lands.

Blair filed his declaratory statement for said tract February 27, alleging settlement February 23, 1884.

McMillen filed declaratory statement for the E. $\frac{1}{2}$ of said tract and the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of said section March 10, alleging settlement March 4, 1884.

Blair made final proof September 1, 1884, against the acceptance of which McMillen filed protest, upon which a hearing was ordered and had before the local officers. McMillen having in the mean time offered final proof under his filing. As a result of said hearing the local officers decided that Blair's proof should be rejected upon the ground that it did not show continuous residence, but held that inasmuch as he was the prior settler his filing should be allowed to stand with the privilege of submitting supplemental proof when he could show a residence for six months.

On appeal by Blair to your office it was held "the testimony shows that Blair is a qualified pre-emptor; that he made the prior settlement put up a house, began his residence thereon and has complied with the law as to cultivation and improvement, but that he has failed to reside on the tract for six months next preceding date of making final proof;" that he was endeavoring "to procure title to government land without complying with the requirements of the law as to continuous residence," and his final proof was therefore rejected and his filing held for cancellation.

The decisions of the local officers and your office seem to be based upon the theory that applicants to purchase this class of lands must show, in addition to an actual settlement, a continuous residence for a

period of six months next preceding the offer of final proof. This, however, is not required under the regulations of the Department. The laws providing for the disposal of these lands are quite fully discussed in the case of *United States v. Woodbury et al.* (5 L. D., 303) where it was said by Secretary Lamar:

I am of the opinion that under the act of May 28, 1880, the only qualification and condition required to authorize an entry upon the Osage Indian trust and diminished reserve lands is, that the claimant must be an actual settler on the land at date of entry, and must have the qualifications of a pre-emptor.

In the circular of instructions issued April 26, 1887, (5 L. D., 581) it is said, "six months continuous residence next preceding date of proof is not an essential requirement but it is essential that the settlement be shown to be actual and bona fide."

The testimony in this case shows that Blair made his settlement as alleged on February 23, established his residence there the same day, and at date of final proof had twenty-two acres broken, one acre of which he had planted with potatoes and the balance of which was at date of hearing, November 17, 1884, planted in wheat. His improvements at date of final proof were valued at \$150. In the early part of March he was called to Missouri by the sickness of a sister. He returned to this land on March 27, and remained there continuously until sometime in May when he procured work in the town of Saratoga, about five miles from the land. He continued working there during the summer, returning to his land generally on Saturday night and remaining over Sunday. During this time he boarded at different places in Saratoga, but kept his clothes and his furniture, consisting of a stove, bed and bedding, cooking utensils, etc., in his house on this land. I am of the opinion that the testimony shows that Blair was a qualified pre-emptor, and that he was the prior settler on the tract in controversy; that his settlement was made in good faith; that he was at date of final proof an actual settler on said land, and that he has, therefore, shown such a compliance with the requirements of law as to entitle him to purchase said tract. Your said office decision is therefore reversed and Blair will be allowed to complete his entry upon the proof already made.

MELVIN ET AL. v. THE STATE OF CALIFORNIA.

Motion for review of departmental decision rendered February 10, 1888 (6 L. D., 702), overruled by Acting Secretary Muldrow, June 11, 1888.

PRE-EMPTION—AMENDMENT—SECOND FILING.

COWAN *v.* ASHER.

In cases of *bona fide* mistake, made by parties exercising ordinary care and prudence, and in the absence of intervening adverse rights, the lands intended to be taken may be substituted for those mistakenly filed upon or entered.

A second filing is not permissible except in cases where the claimant, through no fault of his own, was unable to perfect entry under the first.

Acting Secretary Muldrow to Commissioner Stockslager, June 11, 1888.

I have considered the case of Hugh A. Cowan *v.* John Asher, involving the E. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of Sec. 19, T. 4 N., R. 32 W., McCook district, Nebraska, on appeal by Cowan from the decision of your office of September 14, 1886, "holding his homestead entry of said land subject to Asher's pre-emption filing thereon."

On November 14, 1884, Cowan made homestead entry, No. 1991, embracing said tract, and on the 24th of that month Asher filed declaratory statement therefor, alleging settlement August 28, 1884. Asher tendered proof April 27, 1886. Cowan protested against the acceptance of the proof, upon the grounds: (1) "that Asher was not a qualified pre-emptor, because of his having made a former pre-emption filing," and (2) "that Asher did not settle on the land until after he (Cowan) had made entry for the tract." Hearing was regularly had and the local officers awarded the land to Asher. From this decision Cowan appealed, and your office, by said decision of September 14, 1886, held Cowan's homestead entry subject to Asher's pre-emption filing. Cowan now appeals to this Department.

It appears that Asher had, June 28, 1874, filed declaratory statement, No. 391, at North Platte, Nebraska, for a certain other tract of land, alleging settlement thereon, May 25, 1874. In an affidavit made by him, March 24, 1885, in support of an application for restoration of his pre-emption right, Asher states: "At the time I filed declaratory statement for said land" (the land filed upon June 28, 1874), "I was unable to find the government corners thereto, owing to the imperfect government survey. I traced the lines as I supposed them to run and located my claim according to the best information I could obtain. I afterwards had the land surveyed and found the government corners. I then found that the land I had filed on was not the land I supposed I was getting. Upon learning this, I left or abandoned the land and left the country soon afterwards. I never made final proof upon said claim—it was not the land I thought I was getting, and I did not consider it worth \$1.25 per acre for agricultural or any other purpose."

In my opinion, this affidavit does not exonerate Asher from the charge of negligence, or failure to exercise proper care, in making said pre-emption filing. It does not set forth, wherein the government sur-

vey was imperfect, or what efforts he made to locate his claim correctly, except that he "traced the lines *where he supposed them to run*, and located his claim according to the best information he could obtain." What this information was and from what source derived, is not stated. If Asher had procured the survey to be made *before*, instead of *after*, the filing, the alleged mistake would have been avoided. It is clear that, at the time he made his filing, he was uncertain whether it embraced the land he desired, as he states that he "was unable to find the government corners thereto," and "traced the lines himself as he supposed them to run." In voluntarily acting upon an uncertainty, he assumed the risk.

In the case of Henry E. Barnum (5 L. D., 583), the affidavit set forth specifically upon what information Barnum acted and from whom derived, and, on discovering the mistake, he did not abandon the land upon which he had settled, but immediately took steps to correct the mistake and secure said land, by applying for leave to amend his entry, thereby demonstrating his entire good faith. In case of *bona fide* mistake made by parties exercising ordinary care and prudence, and in the absence of intervening adverse rights, the lands intended to be secured by the claimant may be substituted for those mistakenly filed upon or entered. A. J. Slootskey (6 L. D., 505); (Henry E. Barnum, (*supra*); Goyne v. Mahoney (2 L. D., 576). As it does not appear that any intervening rights of third parties had attached to the land which Asher intended to file upon, he might, if the mistake was not the result of the want of ordinary care and prudence, have secured the land by taking the proper steps to have the mistake corrected. He did not attempt to pursue this course, however, but at once left the land upon which he had settled and gave up all claim to that filed upon, because, as he says, "I did not consider it worth \$1.25 per acre for agricultural or any other purpose."

Under section 2261 of the Revised Statutes, a pre-emptor may file but one declaratory statement for land free to settlement and entry. The circumstances attending the *first* filing made by Asher and his conduct in reference thereto as disclosed by his affidavit, do not, in my opinion, bring said filing within any recognized, or properly recognizable, exception to said rule, and his *second* filing upon the land in controversy was contrary to law and should have been disallowed. (Allen v. Baird, 6 L. D., 298).

This view renders it unnecessary to consider the second ground of protest.

The decision of your office is reversed, and you are directed to cancel the pre-emption filing of Asher and to allow the homestead entry of Cowan to remain intact subject to future compliance with the law.

FINAL PROOF—CROSS-EXAMINATION.

ELIZABETH B. HERRIN.

The final proof on direct examination being full and explicit may be accepted, in the absence of anything indicating bad faith, although the cross-examination does not fully cover the ground contemplated by the regulations.

The failure of the officer before whom the final proof was made to attach the jurat to the cross-examination will not defeat the consideration of the final proof, where it is apparent from the record that the cross-examination was duly sworn to.

Acting Secretary Muldrow to Commissioner Stockslager, June 11, 1888.

I have considered the appeal of Elizabeth B. Herrin from your decision of December 6, 1886, rejecting her final proof, submitted on her homestead entry, No. 3864, and embracing the SW. $\frac{1}{4}$ of Sec. 2, T. 19 N., R. 5 E., M. D. M., Marysville, California.

Said entry was made August 3, 1886, and final proof was made November 5, 1886, before the clerk of the superior court in Butte county, California. The local officers rejected said proof, and claimant appealed to your office, which sustained the office below, for the following reasons:

1st. The cross-examination of the witnesses is not directed to the use and purposes for which entry is sought to be made, as required by paragraph four of circular of December 15, 1885 (4 L. D., 297).

2d. The jurat of the officer administering the oath does not appear upon the papers containing the record of the cross-examination of the witnesses, as required by circular of September 23, 1886 (5 L. D., 178).

From your decision claimant appeals and claims that your said objections are simply technical as to a matter of form, and that the proof has been made in good faith and shows full compliance with the law.

Upon an examination of the proof, I find that claimant resided upon the land, with her husband, from 1863 to 1876, when he died on said land, and that since his death she has continued her residence there with her children, and has made valuable improvements. There is nothing to impugn her good faith, or to cast the least suspicion thereon.

While the cross-examination does not fully cover the ground contemplated by the circular cited, the omission may, I think, be excused, in view of the full and explicit character of the proof on direct examination, and of the absence of anything tending to show any want of good faith; especially since it appears that at the date the proof was made, the printed blanks, with cross-interrogatories to meet the requirements of the circular of December 15, 1885, had not been promulgated so as to be available in the land district in which this tract is. Written cross-interrogatories were put, which practically meet the requirements of the circular, except as to the purpose for which the entry was made, and these were satisfactorily answered.

The purpose of the entry may be clearly gathered from the proof as a whole, and, as the omission to answer such question categorically,

was no fault of claimant or her witnesses, I do not think her proof, in view of the facts as they appear, should be rejected.

As to the second point of objection which your decision makes to the proof, I find that the cross-questions and the answers thereto are all in writing, and on papers attached with mucilage to the papers containing the main or direct examination of the claimant and her witnesses, respectively.

Though there is no jurat on any of the papers thus attached, the jurat on the main and direct examination in each contains the following words: "That the foregoing testimony, including cross examination, was read, etc., before being subscribed, and was sworn to," etc.

The only cross examination being that attached as aforesaid, the natural and reasonable conclusion is that it was duly sworn to, and I think, in view of all the circumstances, it should be so accepted.

Finding, therefore, that your holding on both the points made the occasion of this appeal is error, I must overrule the same, and reverse your decision based on said holdings.

You will accordingly remand the case to the local office, with direction to issue the necessary and usual final papers, if no objection appears other than that found by your decision.

PRACTICE—EVIDENCE—RESIDENCE—MILITARY SERVICE.

HALL v. WADE.

The failure of the notary before whom evidence is taken to transmit the same in the manner required by law, is such an irregularity as might defeat its consideration on objection properly raised thereto; but such objection should be made before the case reaches the Department on appeal.

In such a case application for a rehearing, based on said irregularity, will be denied where a meritorious case on the facts is not shown by the applicant.

Service in the army of the United States cannot be construed to be equivalent to a residence on land claimed under the homestead law, during the time of such service, in case where no residence has been established.

Cultivation and improvements, without residence, do not constitute compliance with the homestead law.

Acting Secretary Muldrow to Commissioner Stockslager, June 11, 1888.

I have before me the papers in the case of Eugene G. Hall v. Harry M. Wade, involving the NW. $\frac{1}{4}$ of Sec. 8, T. 139 N., R. 62 W., Fargo land district, Dakota, on appeal by Wade from the decision of your office, dated July 26, 1886, holding for cancellation his homestead entry for the tract above described.

It appears from the record, that on April 20, 1882, Wade made entry for said tract, and that on April 10, 1883, Hall filed his duly corroborated affidavit of contest against the same, charging abandonment and failure to settle upon and cultivate the land as required by law, and thereupon a hearing was ordered for May 15, 1883, and notice thereof

duly given by publication; that upon said last-mentioned date, by stipulation of the parties, by their attorneys, it was ordered that the testimony be taken before one J. J. Le Tourneau, a notary public at Jamestown, Dakota, and the case was continued to await the same. On the day set for the taking of testimony, namely, June 7, 1883, the contestant appeared in person and by attorney, and the claimant appeared by J. C. Wade, his attorney, at which time the testimony was commenced and continued on the day following, when it was closed. Upon request of the contestant's attorney, and with the consent of the attorney for claimant, it was agreed that the testimony should be retained by the notary, in order to furnish counsel for contestant an opportunity to compare his notes with the same. Shortly afterwards, and before the testimony had been forwarded to the local office, while the notary was absent on a visit, in the east, his office was destroyed by fire, with most of its contents, and for a long time it was supposed and believed, that said testimony was also destroyed. In December, 1884, however, it seems that it was found with some other papers of the notary, in another office in Jamestown, and was thereupon forwarded to the local office by W. E. Dodge, the contestant's attorney, with his affidavit thereto attached, in which it is averred, after some preliminary statements:

That the written testimony hereunto annexed is the identical testimony and the whole thereof, taken in said contest before notary And that affiant was informed and believed that said testimony was duly filed by said notary until informed by letter from said Land Office, late in the spring of 1884, to the contrary, and that said notary had informed said office and the register and receiver thereof that said testimony was destroyed by the fire which destroyed said notary's office in the winter of 1883.

And affiant further says that within a few days last past while searching among the papers of said notary in an office in Jamestown, D. T., he discovered said testimony and the whole thereof, which he now forwards to this office, and prays that the same may be filed and considered by the register and receiver of this office in the final disposition of this case, with the same credit and to the same effect that it would have been entitled to had it been filed by said notary at the date designated therefor in said order.

On January 2, 1885, upon receipt of said testimony, accompanied by the said affidavit, the local officers endorsed upon the same the following memorandum, namely:

On reading the above and foregoing affidavit of W. E. Dodge, attorney for contestant, and on inspection and examination of the testimony thereunto annexed, and the records of this office, it is ordered that said testimony be filed with the other papers in said cause, and considered by the register and receiver in the final disposition thereof.

Thereupon, without notifying claimant's attorney, the local officers proceeded to consider the case, and decided that the charges of contest were sustained, and that claimant's said entry should be canceled; of which decision they gave due notice to the attorneys of both parties.

Upon the receipt of the notice of said decision, the claimant's *attorney* filed *his* petition, asking that the case be opened, and that an opportunity be given *him* to produce further testimony to show that the claimant had made improvements upon the tract in question within six months prior to the commencement of the contest, and that on January 8, 1883, he had enlisted in the military service of the United States. This application is supported by the affidavits of one Clinton Wade, father of claimant, and the said notary, in which the statement is made that said testimony was retained, as stated, for the purpose, also, of allowing contestant to introduce further testimony, if he desired to do so, but there is no direct attack made therein against the testimony, nor any effort to impeach its genuineness.

The local officers refused to open the case, because it was not shown that claimant himself was not fully aware of the facts sought to be proven, at the date of the hearing, and they further found that:

The testimony as returned to this office bears no marks of having been tampered with in any manner, the notary's signature following the jurats is clearly that of the officer to whom the case was referred to take and return the testimony, and we see no reason for ordering a new hearing.

The claimant, by his said attorney, thereupon appealed from both of said decisions of the local officers, making no specific assignment of error in his appeal, but insisting that by reason of claimant's enlistment in the United States Army, after making said entry, no contest could thereafter be allowed against the same, alleging that the decisions appealed from are contrary to law, and asking for a reversal of the same. No attack is made in said appeal upon the testimony, nor any question raised as to its genuineness, or regularity. Your office affirmed the finding of the local office, and from this decision the claimant appeals, insisting now, for the first time, that the local officers had no authority, in view of the special circumstances, to consider and act upon said testimony, and that the same should have been rejected by them, for want of jurisdiction.

From the testimony taken, it appears that claimant purchased the relinquishment of a party, who had filed a declaratory statement on said tract of land, and had built a shanty, eight by ten feet, thereon, and broken about a half an acre, for which he paid the sum of \$110; that in June, 1882, claimant broke about nineteen or twenty acres and sowed the same to flax, which occupied about two weeks time; that in the fall of 1882, the flax was harvested and the ground replowed; that while he did this work, he occupied the shanty, which appears to have been made of single rough boards, unbattened, without floor, door, or window, except a board left out for an entrance, and originally cost only about \$25. No furniture was ever put into it, but while occupying it, as stated, claimant took from his father's house, where he resided, some bedding and cooking utensils, returning them after the work was done. He was a young, unmarried man; and lived at his father's, a short distance from the land, and seems to have visited the land at

some times other than as above stated, but it is not shown that he ever established his residence thereon.

It may well be said that the proceedings in this case have been, in a large measure, irregular. The testimony, though bearing on its face every evidence of having been regularly taken and certified, was not transmitted to the local office in the manner required by law, and, if claimant had sought to take advantage of such irregularity at the proper time and in the proper way, I think it questionable whether such testimony should not have been rejected by your office and a new trial ordered; and, if his claim was shown to be a meritorious one, either by the testimony taken, or by his said application for a rehearing, I would feel disposed, at this late date, to send the case back for a new trial; but as his claim appears, upon his own showing, to be totally without merit, I can not see that anything is to be gained by a rehearing. He never established his residence on the land, and for that reason his enlistment and service in the United States Army, as claimed, even if proven, could not avail him. Service in the army of the United States can not be construed to be equivalent to a residence on land claimed under the homestead law, during the time of such service, in cases where no residence has ever been established.

In the matter of the further improvements sought to be shown by claimant, it is sufficient to say, that cultivation and improvements, without residence, do not constitute compliance with the law, and, therefore, such further improvements, if shown, could not help the case.

I therefore concur in your said office decision, and the same is affirmed.

PRACTICE—AMENDMENT—TIMBER CULTURE CONTEST.

GRIFFIN v. FORSYTH.

After due notice the contestant may amend his complaint, and thereafter submit evidence in support of the charge as amended.

That an entry is held for the benefit of another is a good ground of contest against a timber culture entry.

Secretary Vilas to Commissioner Stockslager, June 13, 1883.

I have considered the case of Michael Griffin v. Charles Forsyth, as presented by the appeal of the latter from the decision of your office, dated July 28, 1886, holding for cancellation his timber culture entry, No. 798, of the NW. $\frac{1}{4}$ of Sec. 6, T. 106 N., R. 32 W., 5th P. M., made March 7, 1878, at the Tracy land office, Minnesota.

The record facts appear to be sufficiently set forth in the decision appealed from, and reference to the same is hereby made.

Your office affirmed the action of the local land officers, for the reason that "the evidence adduced at the hearing established the fact that the claimant had not complied with the requirements of the timber culture law up to the date this contest was initiated." Your office does not find, and the evidence does not show that the claimant has acted in

bad faith, and were there no other objection in the record, since it appears that at the date of the contest there were from thirty-four to thirty-six hundred trees growing upon said tract, it would seem that the claimant should be allowed to amend his entry by relinquishing a part of the land, and retain the amount of land that his cultivation and planting would have entitled him to under the timber culture law. *Linderman v. Wait* (6 L. D., 689). But the record shows that the contestant asked leave to amend his complaint, pursuant to notice to the defendant, alleging that the entryman was holding the said entry for the use and benefit of one George Forsyth. The local land officers refused to allow the amendment and your office holds that their action was erroneous. .

In said conclusion of your office I concur.

At the trial, the contestant offered to prove by competent evidence that "over six years ago the defendant sold one '80' of this claim to his father, in exchange for a horse, and about the same time sold the other '80' thereof to his brother, George Forsyth, who built a house on, and has since been living on the claim, and further that the father, Daniel Forsyth, sold the '80' he bought to the said George Forsyth, and that George Forsyth is now the owner of this claim, and that the defendant has no interest therein whatever."

If the complaint had been amended, as it ought to have been, then the evidence proposed to be introduced by the contestant would have been admissible, and, if the allegations had been clearly proven, the entry would, unquestionably, have been forfeited. *Sims v. Busse et al.* (4 L. D., 369.)

The record should be returned to the local office, and a rehearing ordered, after due notice to both parties. At said rehearing, the local land officers should be directed to allow said amendment, and to permit the contestant to introduce the evidence proposed, relative to the sale of said land, and the parties may also offer any additional evidence they may have, relative to the validity of said entry and the entryman's compliance with the requirements of law.

The decision of your office is modified accordingly.

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SECOND FILING—SECTION 2230, REVISED STATUTES.

FRANK H. SELLMAYER.

Though the first filing may have been voidable for the want of a prior settlement, yet as it was made for land open to settlement and entry, and failed through the fault of the claimant he cannot be allowed to file a second time.

The prohibition in the pre-emption law against persons who quit or abandon their residence on their own land, is not restricted to those who hold the legal title to said abandoned land, but extends as well to those who hold under equitable title.

Secretary Vilas to Commissioner Stockslager, June 13, 1883.

I have considered the appeal of Frank H. Sellmeyer from the decision of your office of June 4, 1886, sustaining the action of the local officers

in rejecting his application to make pre-emption filing for the SW. $\frac{1}{4}$ of SE $\frac{1}{4}$ of Sec. 34, T. 8 S., and the W. $\frac{1}{2}$ of NE. $\frac{1}{4}$ and NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of Sec. 3, T. 9 S., R. 64 W., Denver district, Colorado.

It appears that Sellmeyer, April 21, 1880, made homestead entry upon a certain tract of land, and on April 27, 1885, five years and six days after said entry, received final certificate therefor. On October 10, 1884, six months and a half before the issuance of said final certificate, he filed a pre-emption declaratory statement for a certain other tract of land, alleging settlement thereon, October 4, 1884.

His present application, which is dated February 23, 1886, and alleges settlement the day previous, is accompanied by an affidavit that said filing of October 10, 1884, was made under a misapprehension of the law, and "that at the time he made said filing he was living upon his homestead, and as soon as he had been informed of the illegality of his said pre-emption filing he gave up all claim thereto."

The settlement required of the pre-emptor must be made *bona fide* with the intent to make the tract a home.

It is not shown what were the acts of the alleged settlement of October 4, 1884, on the land filed upon, October 10, 1884; but, however that may be, I am of the opinion, that settlement could not in contemplation of law have been made on that land, while the alleged settler was residing upon and perfecting his claim to another tract as a homestead.

A person can not have the *bona fide* intent to make a home on two different tracts at the same time. *Collar v. Collar* (4 L. D., 26); *Krichbaum v. Perry* (5 L. D., 403).

If, therefore, Sellmeyer's residence was upon the homestead tract October 4, 1884 (which he is estopped from denying, as his homestead proof must have covered that date), it follows that the allegation in his declaratory statement of settlement on that day upon the tract filed upon October 10, 1884, was not true, and as no other settlement on said tract is alleged or shown, the filing thereon was for want of settlement, if for no other reason, invalid. (*Kate Walsh*, 6 L. D., 168.)

But, though invalid, it was not necessarily void, as the land filed upon was open to settlement and entry, and by abandoning the homestead tract and giving up all claim thereto, a *bona fide* settlement might have been made upon the former.

In the case of *Allen v. Baird* (6 L. D., 293), it is said that "under the provision of section 2261, Revised Statutes, a pre-emptor may file but one declaratory statement, for land free to settlement and entry. This ruling has been uniformly followed and the only exception is where the pre-emptor is unable to perfect his entry on account of some prior claim and there is no fault on his part."

There is no pretense that there was any "prior claim" to the land filed upon October 10, 1884, or that said land was not "free to settlement and entry;" and Sellmeyer's conduct in alleging settlement under

the pre-emption law on one tract while occupying and perfecting his claim to another under the homestead law, if consistent with good faith on his part, can not be claimed to be entirely free from fault.

While ignorance of a material fact may excuse a party from the legal consequences of his conduct, ignorance of the law, when (as in this case) the law itself is not doubtful, does not afford excuse. Clayton M. Reed (5 L. D., 413); (Broom's Legal Maxims, 253).

It appears, moreover, that Sellmeyer, April 27, 1885, received final certificate for the homestead tract, which is in the same State (Colorado) with the land embraced in his present application, and it is not shown that he has in any way parted with his claim or title to said homestead tract. Having made final proof and received final certificate on his homestead entry, he held the *equitable* title to the homestead tract, and, as is said in *Ware v. Bishop* (2 L. D., 616), "I do not think Congress intended to restrict the prohibition in the pre-emption law against persons who quit or abandon their residence on their *own land* to persons who hold the *legal* title to such abandoned lands." See, also, on this point, *Goyne v. Mahoney* (2 L. D., 576).

The decision of your office is affirmed.

SUBSTITUTED FINAL PROOF.

GEORGE F. REED.

The final proof submitted by the claimant having been lost in the General Land Office, duplicate thereof may be substituted without republication of notice.

In making such substituted proof the affidavits required of the pre-emptor may be executed outside of the land district in which the land is situated.

Secretary Vilas to Commissioner Stockslager, June 13, 1888.

I am in receipt of of your office letter of the 19th ultimo transmitting affidavits as to residence in the case of George F. Reed, who made cash entry, No. 2706, for the SE. $\frac{1}{4}$ of Sec. 20, T. 9 N., R. 25 E., Walla Walla, Washington Territory.

Said affidavits were taken and filed pursuant to departmental letter, dated February 2, 1888, which was an approval of your suggestion that if Mr. Reed will (without republication of notice) furnish, as nearly as practicable, a duplicate of the proof lost by your office, a new certificate of entry may properly issue as a basis for patent.

The purpose of that order was to have reproduced as nearly as possible the proofs upon which the entry was allowed by the local office. To do this the same witnesses, if available, who testified on final proof, should make affidavit stating the facts within their knowledge as to claimant's settlement and improvement, and whether the statements made in their respective affidavits are substantially the same as those made in their testimony taken in final proof. So far as the claimant

himself is concerned, the affidavits required of him may be made before a proper officer nearest where he now is, since to put him to any great expense, such as might be necessary if he were required to go from California, where he is now at work, to the Walla Walla district in Washington Territory, where his original proof was made, might be an unreasonable hardship to impose, in view of the fact that the original papers were lost while in the custody of the government, and therefore through no fault of claimant.

He, like the witnesses, should as nearly as possible reproduce his former testimony; he should also state when and before whom his former proof was made, and the date of the same. Upon receipt of proof of the character indicated, you will proceed to pass upon the same as in other cases, and if found satisfactory, a new certificate of entry may issue, and in due course of business a patent.

PRACTICE—TIMBER CULTURE CONTEST.

STEBBINS v. FELDER.

A timber culture entry was perfected July 5, 1882, and contest affidavit filed July 5, 1884, charging failure to break the requisite ten acres; *Held*, that the contest was not premature, and that as the hearing thereunder must necessarily occur after expiration of the second year, the right of the claimant to show compliance with law within the statutory period would not be abridged by the allowance of such contest.

Secretary Vilas to Commissioner Stockslager, June 14, 1888.

The appeal in this case is from your decision holding the timber culture entry of Felder for the N. W. $\frac{1}{4}$, Sec. 20, T. 112, N., R. 70, W., Mitchell series, Huron, Dakota, for cancellation.

The first question presented is one of practice. At the hearing before the local officers, the claimant moved to dismiss the contest on the ground that, first, "the second full year had not expired at the time of the filing of said contest; second, because the time which the claimant had to comply with the law at the time of filing said contest had not expired." The local officers denied the motion, and your office agrees with that decision. The entry was made, as I understand, on the third day of July, 1882, but was not technically complete by the payment of the fees and the issuance of the register's receipt until the 5th day of July, 1882, which date the receipt bears. The affidavit of contest was filed July 5, 1884, and alleges as the basis of contest a failure to break five acres during the second year of entry. The point of the motion to dismiss was that the entryman had all day of the 5th of July, 1884, to break the five acres required to be broken during the second year, and hence that the contest was premature; and it finds support in the case of *Tripp v. Stewart* (7 C. L. O., 39.) decided May 31, 1880, in which a contest filed

September 17, 1879, against a timber culture entry made September 17, 1878, was held to be premature and unauthorized by law, and to confer no jurisdiction on the local officers. I think this doctrine too refined and technical to defeat a contest otherwise meritorious, and should not be willing to follow the decision referred to, if a determination were to turn on that point. Besides, a nicely technical view hardly leads to it. In the first place, the year which began on the 5th day of July, 1883, expired with the 4th day of July, 1884; and if it be decided, as it should be, perhaps, that the first day is to be excluded in the computation, then, inasmuch as the law takes no account of parts of days, the affidavit of contest should rather be regarded as having been filed at the end of the three hundred and sixty-fifth day, instead of at the beginning of it, and thus after the time had expired for the purposes of the work. The hearing of the contest must necessarily have occurred after the expiration of the second year; and, therefore, the interests of the entryman are entirely protected because if he could show actual compliance within the period limited by the statute, whether before or after the actual filing of the affidavit, he would prevail.

The testimony taken before the local officers, and upon which their and your decisions were based, shows that at the expiration of the second year only four and three-quarters acres had been broken, instead of the ten acres required by law. The failure is substantial and material and required the cancellation of the entry.

Your decision is affirmed.

RULES OF PRACTICE—RULE 114 AMENDED.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 14, 1888.

The following amendment, approved March 27, 1886, to Rule 114 of Practice, to wit:

Motions for a review of decisions of the Secretary should be filed with the Secretary, who may, in his discretion, suspend action on the decision sought to be reviewed until such motion shall be decided,

is hereby revoked; and Rule 114 of Rules of Practice, approved August 13, 1885, to wit:

Motions for review before the Secretary of the Interior, and applications under Rules 83 and 84, shall be filed with the Commissioner of the Land Office, who will thereupon suspend action under the decision sought to be reviewed, and forward to the Secretary such motion or application, will from this date be in force.

S. M. STOCKSLAGER,
Commissioner.

Approved June 14, 1888:

WM. F. VILAS,
Secretary.

PRE EMPTION AND HOMESTEAD ENTRIES—APPROXIMATION.

WILLIAM C. ELSON.

The entry of a surveyed quarter section as such, is authorized by the pre-emption and homestead laws, and the limit of acreage applied only when entry is made of parts of quarter sections.

Secretary Vilas to Commissioner Stockslager, June 14, 1888.

Your decision of May 25th, 1886, required this appellant to relinquish one of the four minor sub-divisions of the quarter section upon which he had made his homestead entry, the N. E. $\frac{1}{4}$ of Sec. 3, T. 112 N., R. 61 W., Huron, Dakota, land district. The quarter section is sub-divided into lot 1, containing 51.85 acres, Lot 2, 51.85, the S.W. $\frac{1}{4}$ N.E. $\frac{1}{4}$, 40 acres, and the S.E. $\frac{1}{4}$ N.E. $\frac{1}{4}$ 40 acres, making a total of 183.70; and you observe that by dropping one of the two latter tracts the entry would be more nearly approximated to one hundred and sixty acres than it now is. This is said to be the rule of applying the statute, which it is claimed limits an entryman to one hundred and sixty acres in quantity. Yet by this rule the statute must be violated whenever by the approximation more than one hundred and sixty acres are allowed to the entryman.

I do not think that rule is a correct interpretation of the statute, certainly as applied to a case like this. The statute (R. S. Sec. 2289), provides that every qualified person:

Shall be entitled to enter one quarter section or a less quantity of unappropriated public lands subject to pre-emption at \$1.25 per acre; or eighty acres or less of such unappropriated lands, at \$2.50 per acre, to be located in a body, in conformity to the legal subdivisions of the public lands, and after the same have been surveyed. And every person owning and residing on land may, under the provisions of this section, enter other lands lying contiguous to his land, which shall not with the land so already owned and occupied exceed in the aggregate one hundred and sixty acres.

This claimant entered "one quarter section" in conformity to the legal sub-divisions of the public lands after the same was surveyed. He was so "entitled". I am unable to discern any authority in the statute for denying to him the right it explicitly gives, because the quarter section contains more than one hundred and sixty acres. That was not his fault, nor does it render the quarter section any the less such in the meaning of that term as employed in the statute and as applied to the surveys of the United States. It is true that generally the quarter section, if the survey be correct, will contain one hundred and sixty acres; but it was well known to Congress that many quarter sections were fractional in the survey, and that many, which were not fractional, did not contain exactly the one hundred and sixty acres of land. They, therefore, gave a settler the quarter section as it should be found surveyed. The fact that in speaking of a half quarter section the term eighty acres

is used does not restrict the language of the statute in respect to a quarter section, nor, probably, would it in respect to the term eighty acres alone if two contiguous tracts in a half quarter section contained more than eighty acres. I do not understand that your office rejects the entry for the excess, and it was undoubtedly the meaning of Congress that the term eighty acres should be used substantially as the half of a quarter section, as manifested by the phrase which follows in qualification, viz: "in conformity to the legal sub-divisions of the public lands."

It is said that the homestead law is *in pari materia* with the pre-emption law, and that the pre-emption law requires this interpretation of the statute. I do not think the homestead law can be altered or qualified by a former act, as the pre-emption act was, although it were different.

I do not, however, read the pre-emption law differently. It authorizes every qualified person who makes settlement, residence and improvement on the public lands to "enter with the register of the land office for the district in which such land lies, by legal sub-divisions, any number of acres not exceeding one hundred and sixty, or a quarter section of land." This sentence must be read in the disjunctive, or the last phrase must be understood as added to explain what is meant by the former. Either view leads substantially to the same interpretation.

If the sentence be read in the disjunctive it must mean the same when transposed, and it would then read substantially like the homestead law, that any qualified person is authorized to enter a "quarter section of land," or legal sub-division not constituting a quarter section of land, but not exceeding one hundred and sixty acres. This would allow the entry of a surveyed quarter section as such, and leave the limit of acreage to be applied to the selection of fragments of quarter sections.

If the last phrase of the statute as written be intended merely to explain the preceding, the consequent interpretation is that the entry may be made by legal sub-divisions of any number of acres not exceeding a quarter section, usually one hundred and sixty acres. Thus it would mean, as the homestead law doubtless does, a quarter section to be located in conformity to the legal sub-divisions of the public lands after the same have been surveyed.

In both laws, it seems to me that it was the purpose of Congress to deal not so much with the acreage as with the sub-divisions of the public lands as surveyed. An actual area-measurement of the government surveys shows, as is well known, that few sub-divisions contain exactly the number of acres reported by the surveyor, generally containing more or less. The grants of the United States are not by quantity but by description, and, it is a familiar rule, that a call of quantity in a grant, must yield to description, and the act of Congress is to be regarded as a grant as to each tract, in a certain sense. These acts were designed to be construed with liberality and fairness to the settlers on

the borders of our civilization, who were its advance-guard in subjugating the wilderness. I understand this to have been for many years the interpretation of the law, and that, in restoring it, the Department proceeds not only in the spirit of the enactments, but upon the basis of the interpretation given those enactments contemporaneously with their passage and for many years after.

See the cases of *U. G. Shaw* (1 C. L. L., 309); *P. O. Aanrud* (2 C. L. L., 374, 7 C. L. O., 103), citing 2 Op. Atty.-Gen., 578, and 3 *ibid.*, 115. Also *Bladen v. Southern Pacific Railroad Company*, (9 C. L. O., 119), and *Owen L. Ramsey* (*ibid.* 172). The latter case was decided November 20, 1882; and this appears to have been the line of decision and the practice of the office since the question was first raised. But on the 8th of September, 1883, in the case of *H. P. Sayles* (2 L. D. 88), the rule appears to have been changed and the approximation practice established. There is nothing, however, in the consequences of that change of rule which should operate to prevent the correct interpretation of the statute as it was understood during a long series of years, as appears to me unquestionably to be correct. I perceive no reason why a claimant should be denied what he is "entitled to" under the statute, in the fact that a different opinion was at one time entertained. It may be that other claimants have been denied what they would have received under the rule now contended for, but this operates no injury except to them. There is nothing in the principle to demand the application of the rule of *stare decisis*.

Reference may be made to other parts of the statute, but the argument appears not to be affected by the language elsewhere used. See Revised Statutes, sections 2304, 2286, 2287, and 20th Statutes, 113.

Your decision is reversed and patent should issue to the claimant, if his proof otherwise entitle him to it, for the quarter section entered.

EQUITABLE ADJUDICATION—ADDITIONAL RULES.

DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE, Washington, April 28, 1888.

The following rules are hereby established, with the concurrence of the Secretary of the Interior and Attorney General, as additional to the regulations in accordance with which suspended claims are decided under sections 2450 to 2457 United States Revised Statutes as amended by the act of Congress of February 27, 1877, viz:

28. All desert land entries made by a duly qualified party under the act of March 3, 1877, where the land was properly subject to entry under said act, and the land has been reclaimed according to law, but where any of the declarations, affidavits, or proofs required under the statute were omitted or are defective, in consequence of ignorance, ac-

cident, or mistake, and where from the death or absence of the claimant the missing papers can not be supplied, or the defective papers amended, and where there is no adverse claim.

29. All desert land entries in which the final proof and payment were not made within three years from date of entry, but in which the claimant was duly qualified, the land properly subject to entry under the statute, and subsequently reclaimed in time according to its requirements, in which the failure to make proof and payment in time was the result of ignorance, accident, or mistake, and in which there is no adverse claim.

30. All desert land entries in which neither the reclamation, nor the proof and payment were made within three years from date of entry, but where the entryman was duly qualified, the land properly subject to entry under the statute, the legal requirements as to reclamation complied with, and the failure to do so in time was the result of ignorance, accident or mistake, or of obstacles which he could not control, and where there is no adverse claim.

S. M. STOCKSLAGER,
Commissioner of General Land Office.

We concur in the foregoing additional rules.

May 12, 1888.

WM. F. VILAS,
Secretary of the Interior.
A. H. GARLAND,
Attorney General.

PRACTICE—APPEAL—ACKNOWLEDGEMENT OF SERVICE.

SHELDON v. WARREN.

Acknowledgement of service, by opposing counsel, of an appeal taken after the time allowed therefor, does not cure the defect or waive the right to have said appeal dismissed.

Secretary Vilas to Commissioner Stockslager, June 15, 1888.

Freelan S. Warren by his attorney Norton D. Walling, has filed application for certification of the record in the above stated case under Rules 83 and 84, Rules of Practice. Exhibited with said application is a copy of your office letter of November 21, 1887, addressed to the register and receiver at Huron, Dakota, as follows :

By letter of February 9th 1887 Freelan S. Warren's H. E. 5407, SE. $\frac{1}{4}$, Sec. 22. T. 120 N., R. 66 W., was held for cancellation upon the testimony submitted in the case of Henry F. Sheldon *vs.* said Warren. It is shown by your letter of Oct. 27th 1887, that notice of this decision was given Warren through his attorney, N. D. Walling, Huron April 28th 1887.

You transmit the appeal filed by said Walling July 11th 1887. The appeal not having been filed in time cannot be entertained, rules 86 and 90.

It is admitted by applicant that said appeal was not taken in time but, he alleges that "by verbal agreement between affiant and the said Comfort, the time was extended as will appear from acceptance of said notice of appeal by opposing counsel." What that agreement is is not shown by the application.

Acknowledgement of service by opposing counsel of an appeal taken after the time does not cure the defect, or waive the right to have said appeal dismissed.

The application is denied.

DESERT LAND ENTRY—FINAL PROOF—EQUITABLE ADJUDICATION.

MORRIS ASHER.

Where difficulties attendant upon reclamation prevent the submission of final proof within the statutory period, and good faith is manifest, further opportunity to submit such proof may be accorded, and the entry, in the absence of any adverse claim, be referred to the Board of Equitable Adjudication.

A rule has been adopted by the Board of Equitable Adjudication to cover entries of the class above indicated.

Secretary Vilas to Commissioner Stockslager, June 16, 1888.

I have considered the appeal of Morris Asher from the decision of your office of February 13, 1886, holding for cancellation his desert land entry—No. 28—for Sec. 8, T. 2 N., R. 1 E., Florence (now Tucson) land district, Arizona.

Upon May 26, 1877 Morris Asher filed his declaration that it was his intention to reclaim the section of desert land above described, and made payment of twenty-five cents an acre, amounting to one hundred and sixty dollars, as required by the "act to provide for the sale of desert lands in certain States and Territories", approved March 3, 1877. (19 Stat., 377.)

By letter of September 19, 1881, the local officers reported the entry for cancellation for failure to respond to the order, issued in obedience to the circular of August 28, 1880 (7 C. L. O., 106), to show cause why his entry should not be declared forfeited for failure to make final proof of reclamation of the land and the final payment within three years from date of entry.

By letter of September 19, 1883 the local officers were directed to again notify the entryman to show cause why his entry should not be canceled for failure to make final proof and payment.

In response the entryman filed an affidavit, duly corroborated, explaining as the causes of his failure. The affidavit is as follows:

Morris Asher being duly sworn deposes and says, I am the identical Morris Asher who made desert land entry No. 28 for the whole of Sec. 8, T. 2 N., R. 1 East dated May 26th 1877.

That in the month of June 1878 the grand canal in which I am interested was located and its construction commenced; that from its commencement until the present time said canal has been enlarged and extended from year to year, until the aggregate cost has reached the sum of seventy five thousand dollars; that said canal is now 25 feet wide and from its head to the land in question is 26 miles (this includes 3 miles of private ditch which affiant has had constructed at considerable expense from the end of the extreme northern branch to his land); that it was only through this canal that affiant could obtain water for the reclamation of his land, and it was not completed so as to enable affiant to avail himself of the water from said canal, even by the construction of the three miles of private ditch until the present season.

That he has now there one hundred and fifty acres of said land cleared, and has a growing crop of wheat upon more than one hundred acres of said land, and will within the next two months have more than one hundred and fifty acres of said tract sown to grain; that the great expense required to reclaim the said land has made it impossible for affiant to completely reclaim his land up to the present time. The expense of getting water to the land even through the grand canal for the reclamation of the whole tract, amounts to the sum of \$2,500; that affiant has in good faith endeavored to comply with the law, in reclaiming said tract that he entered, but the great distance from an available point on Salt River, the only stream from which water can be taken for reclaiming said land, the necessity for the united effort of many people to construct the canal and the great expenditure of money required, has made it impossible for affiant to accomplish the reclamation of his land at an earlier day; that if affiant is now permitted to make proof of reclamation and final payment he will be able within a few months, to make proof of the reclamation of the whole tract and will be able to make final payment therefor, and affiant asks that he may be permitted to make such proof and payment within such reasonable time as to justice belongs.

By letter of February 18, 1885, the local officers were directed to call upon the entryman to at once submit his final proof.

By letter of February 13, 1886, you held the entry for cancellation and by letter of June 14, 1886, you notified the local office that the said desert land entry of Morris Asher was canceled upon the records of your office.

June 21, 1886, the appeal of the entryman from the decision cancelling his entry was received at the local office, and was accompanied by his affidavit and specifications of error.

The affidavit of the entryman made June 17, 1886, sets forth:

That he has on the 4th day of June 1886, learned through a friend residing in the city of Tucson where the District Land Office is located, that on Feby. 13th 1886, the Commissioner of the General Land Office held his entry for cancellation allowing him until May 1st to appeal from such order. Affiant further says that he never had any notice of said order or of his right to appeal therefrom until the 4th day of June 1886, and then only as above.

That if any such notice was ever made or directed to him that the same has never reached him, nor come to his knowledge. That if such notice had reached him he would within the time therein allowed have filed his notice of appeal from the said order.

That he now desires to perfect the appeal and hereto attached offers his notice of appeal, and specifications of errors.

Concerning his failure to make proof and payment within the period referred to in the statutes he swears:

I am the person named in the above entitled matter, I have endeavored faithfully to comply with the law in the reclamation of said tract. I have had under cultivation about one hundred and fifty acres of said land and produced a crop of wheat and barley thereon. I have built a small house on the land of lumber, twelve by fourteen feet. I have constructed a branch ditch for a long distance from the grand canal, or most northern branch of said canal to said tract, but could not convey water to the north line of said tract from said ditch.

The land slopes to the south, and the north line is to high for the water to be conveyed to it from this ditch. Another new and large canal was commenced 4 years ago to convey the waters of Salt River to lands outside of and to the north of the grand canal, and said canal was nearly completed last winter but its dam was carried away and about 2 miles of the head of the canal was badly cut up by the freshet in January 1886, and it has not yet been repaired. Had no accident happened to new canal I should have conveyed water to the whole of my land from new canal and completed the reclamation of it, ere this. Another branch from the Grand Canal has now been constructed conveying water far enough north to cover this tract and I have completed arrangements for the construction of a private ditch from this point to my land, and the whole tract will be cleared and reclaimed ready to put in a crop when the sowing season arrives in Oct. of this year.

I ask that the order holding my entry for cancellation may be waived and that I may be allowed to complete the reclamation and make final proof and payment therefor.

In the case of Alexander Toponce (4 L. D., 26,), my predecessor, in a similar case where good faith appeared and persistent efforts had been made against great difficulties to reclaim the land during a period of over eight years, allowed the claimant, there being no adverse claim, another opportunity to make final proof; and in the case of Alexander Douglass (6 L. D. 548), the proof of a desert land claimant made after more than three years had expired from the original entry, was directed to be submitted to the Board of Equitable Adjudication. A rule has been adopted by that Board to cover such cases. It appears manifestly just that special consideration should be given under circumstances of the character detailed in this case. You will, therefore, direct the local officers to give immediate written notice to the claimant that he will be allowed sixty days from the receipt of such notice within which to make proof showing the desert character of the land and full compliance with the law, and to make his final payment; if he fails within the sixty days to make such proof and payment the entry will be canceled. Upon the receipt of such proof, with the opinions of the local officers, the case should be submitted if there be no adverse claim, to the Board of Equitable Adjudication.

,Ypur opinion is modified accordingly.

PRACTICE—APPEAL—RULE 81.

NORTHERN PACIFIC R. R. CO. *v.* MCNEILL.

Failure to appeal from an adverse decision of the local office defeats the right of appeal from the Commissioner's decision affirming the action below.

Secretary Vilas to Commissioner. Stockslager, June 18, 1888.

In the case of the Northern Pacific Railroad Company *v.* A. G. McNeill, involving the right to Lots 5 and 6 and the NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 29, T. 10 N., R. 28 E., Walla Walla, Washington Territory land district, the record shows as follows:

On August 20, 1884, McNeill applied to file pre-emption declaratory statement for said land and the company filed protest against the allowance of such filing.

A hearing was ordered and held at the local office November 4, 1884, at which time and place McNeill appeared and submitted testimony the company making default.

The local officers decided that the land was excepted from the grant, and the company was duly notified of that decision. No appeal was taken therefrom. Upon examination of the case in your office said decision was affirmed, and the company filed an appeal from the decision of your office.

These facts clearly bring this case within rule 81 of Rules of Practice as amended December 8, 1885, which provides, "No appeal shall be had from the action of the Commissioner of the General Land Office affirming the decision of the local officers in any case where the party or parties adversely affected thereby shall have failed, after due notice, to appeal from such decision of said local officers," and said appeal is therefore dismissed.

BRACKEN *v.* MECHAM.*

(On review.)

Secretary Vilas to Commissioner Stockslager, June 19, 1888.

* * * * *

It is evident that the fact that said entries were made under the timber-culture law was inadvertently overlooked, as the effect of the ruling quoted would be to allow entries under said act for more than one hundred and sixty acres in a section of six hundred and forty acres. This should not be. Said decision is therefore modified and changed in so

* See 6 L. D., 264.

far as it allows Bracken to retain any portion of his said timber culture entry if he so elect, and you are directed to cancel the whole of said entry.

* * * * *

PRACTICE—PRIVATE CASH ENTRY.

LEVI J. BILLINGS.

No application to purchase at private cash entry will be considered by the Secretary of the Interior, except by way of reviewing on appeal, or otherwise, the action of the Commissioner in rejecting such application.

Secretary Vilas to Levi J. Billings, Rhineland, Wis., June 18, 1888.

I am in receipt of your letter of the 11th instant, asking for a reconsideration of your application to purchase at private cash entry the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ of Sec. 6, T. 36 N., R. 9 E., Wassau, Wisconsin.

Your application is based upon the ground that the records of the Department are conclusive of your right to enter the land when your application was filed, and that being first in time your application should not be prejudiced by the neglect of the Department to consider your application with reference to the status of the land as it existed when said application was made and passed upon.

When your application was originally passed upon by the Department, the tract applied for was supposed to be still in reservation, the records of the Land Office not having been examined by the law clerk who prepared the opinion.

Whatever rights you may have had under your application made to the Department, cannot be prejudiced or lost by any decision of the Department made under a mistake or misapprehension of the facts, and your application will now be passed upon as if no decision had been made thereon.

All applications to purchase land at private cash entry must be made in writing to the register for the district in which the land is situated, and if certified by the register as vacant land subject to entry the applicant must pay to the receiver the purchase money. If said application is rejected the applicant has the right of appeal from their action, to the Commissioner of the General Land Office.

No application to purchase at private cash entry will be considered by the Secretary, under any circumstances, except by way of reviewing on appeal, or otherwise, the action of the Commissioner in rejecting such application.

Your application cannot be granted.

FINAL PROOF—CONTINUANCE—EQUITABLE ADJUDICATION.

JOHN McCARTY.

When final proof proceedings are continued by order of the local office it should be to a day fixed and certain.

The failure to submit final proof on the day designated being attributable to the local office, and further advertisement by the claimant not being possible, the entry may be submitted to the Board of Equitable Adjudication, it appearing that the rights of other parties will not be prejudiced thereby.

Secretary Vilas to Commissioner Stockslager, June 19, 1888.

I have considered the appeal, filed in behalf of Leland Stanford, Jr., University, from your office decision of November 3, 1886, suspending pre-emption cash entry, No. 8210, made by John McCarty, for the reason that the proof was not taken on the day advertised. The tract covered by said entry is the W. $\frac{1}{2}$ of NW. $\frac{1}{4}$ and tire W. $\frac{1}{2}$ of SW. $\frac{1}{4}$, Sec. 20, T. 24 N., R. 1 W., Marysville, California.

The following are the facts material to the issue, as disclosed by the record :

McCarty filed pre-emption declaratory statement for the tract described July 19, 1884, alleging settlement April 28, 1883.

The township plat of survey was filed in the local office April 19, 1860, and the tract being within the granted limits of the withdrawal of November 25, 1867, for the California and Oregon Railroad Company, was held for disposal as double minimum land.

The claimant, McCarty duly published notice of his intention to make final proof before the register and receiver at Marysville on May 19, 1884. Proof was not made on the day advertised, but was made before the local office on July 7th following. On the same day, claimant, McCarty, made affidavit before the register that he was the same McCarty who had filed pre-emption declaratory statement for the tract in question, and had advertised that he would make final proof on May 19, 1884; that on said May 19th he appeared at the land office, with his witnesses, but was unable to make full proof, because he had omitted to procure a certified copy of his declaration of intention to become a citizen; that the register and receiver thereupon continued the hearing until such time as he could procure said certified copy of declaration of intention; that as soon as he could he procured said copy, and appeared with his witnesses to make the necessary final proof, which was July 7, 1884. He made his proof on that day, and the same was accepted by the register and receiver, claimant paying for the land \$400, and receiving final certificate declaring him entitled to receive patent for the tract.

When the case came before your office for action, it was there de-

terminated that the proof as made could not be accepted, for the reason that it was not made on the day advertised. Claimant was accordingly required to give new notice by publication and posting, after which, should no objection or protest be filed, the proof as already made might be accepted.

From your office decision containing such requirement the Leland Stanford, Jr., University appeals, and sets out by sworn statement the following facts: That soon after the issuance of final certificate to the entryman, McCarty, he sold the tract covered by his said cash entry to Leland Stanford; that on or about November 11, 1885, a year prior to your office decision under consideration, said Leland Stanford conveyed said land to the Leland Stanford, Jr., University, and that said University is now the owner of said land by conveyance, as above set forth; that about one year prior to your said office decision, to wit, about November, 1885, the entryman, John McCarty, died without heirs, in the State of California, or elsewhere so far as known, and that therefore there are no persons competent to make new publication as required by your said office decision; that there are not, nor have there ever been any contestants against said entry, and it would be a great hardship to now insist on requirements which for the reason above stated it is impossible to fulfill.

The pre-emption claimant having with his witnesses appeared at the local office to make proof on the day advertised, the testimony might properly have been taken on that day, with permission to claimant, should his proof as to settlement and improvement be found satisfactory, to file at a future day and as soon as obtainable the certified copy of declaration as to citizenship.

Instead of doing this, the case was continued, and taking of all the proof was postponed to a future day. That future day should have been fixed and determined in the order for continuance, instead of leaving it to the claimant to come in again after he should have procured the missing copy of declaration of intention to become a citizen. However, I do not think any one was injured by the course pursued by the local officers, and the claimant was certainly not to blame for the course which they chose to pursue in the matter.

If there were any to object to the entry, they were cited in by the published notice, which fixed May 19, 1884, as the day when proof would be offered. As claimant and his witnesses were at the local office on that day, for the purpose of making proof, it seems probable that if any one had any objections to the entry, they would have been made and noted on that day.

There is no question as to the entryman's good faith and compliance with the law in the matter of settlement and cultivation. Whatever of irregularity there was in the conduct of the case was chargeable to the register and receiver, and not to the claimant.

It is clear, on the facts as herein stated, that the requirement of your office decision as to new publication of notice can not now be complied with. After a full consideration of the entire record, I am satisfied that the entry ought not to be canceled. It is one which in my judgment may properly go to the Board of Equitable Adjudication for its action, under Sections 2450 to 2457 of the Revised Statutes.

Your office decision is modified accordingly, and you will so refer the case.

MINING CLAIM—APPLICATION—SURVEY.

GOLDEN SUN MINING CO.

While an application for patent, or for survey of a mining claim consisting of several locations, is legal, yet the survey must, in conformity with statutory requirement, distinguish the several locations and exhibit the boundaries of each.

Secretary Vilas to Commissioner Stockslager, June 19, 1888.

I have considered the appeal of the Golden Sun Mining Company from your office decision of November 3, 1886, requiring a resurvey in the case of mineral entry No. 124, Golden Sun Quartz Mine, Marysville land district, in the State of California.

It appears that said entry was made by the company mentioned on the 5th of September, 1881; that it embraced several locations, consolidated into one claim, containing altogether 84.12 acres. The survey, approved in 1873, was of the entire consolidated claim, which it appears covers an irregular tract, without parallel end lines and without lines defining the boundaries of the several locations.

The decision appealed from holds that the survey and the plat in such cases must distinguish the several locations, and that therefore the survey in this case is insufficient and can not be accepted as the basis for a patent, but the parties having apparently proceeded in good faith, a new survey in proper form will be allowed, due notice of which by republication and re-posting is required. From said requirement the company appeals, and claims that the survey as made should be accepted and patent issue.

The question thus raised was considered and passed upon by this Department in the case of S. F. Mackie (5 L. D., 199), in which it was ruled that while an application for patent, or for survey of a mining claim, consisting of several locations, is legal, nevertheless the survey must, in accordance with statutory requirements, distinguish the several locations and exhibit the boundaries of each. Finding no sufficient reason for changing the rule laid down in that case, it must be followed in this.

Your office decision is accordingly affirmed.

HOMESTEAD FINAL PROOF—SUPPLEMENTARY PROOF.

CLARA L. MEGUITY.

Though the final proof may be deficient in the residence shown, yet in the absence of an adverse claim or evidence of bad faith, supplementary proof explanatory of absences may be submitted.

Secretary Vilas to Commissioner Stockslager, June 19, 1888.

I have examined the record in the case of Clara L. Meguity (nee Booker), on appeal by her from the decision of your office dated December 1, 1886, rejecting her final proof submitted on her homestead entry No. 3473, of the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 15, T. 1 N., R. 15 E., M. D. M., made August 12, 1831, at the Stockton land office, in the State of California.

The final proof was made after due notice on September 27, 1886, before the judge of the supreme court for the county in which said land is situated, and it was rejected by the local land officers on September 30, same year, for the reason that the proof as to residence was not satisfactory, because it did not definitely state the dates and duration of the absences from the land, and also for the additional reason that the claimant had married since the date of her said entry.

On appeal your office modified the decision of the local office and held that the subsequent marriage of the claimant was not a bar to her making final proof upon her said claim, but that the final proof must be rejected because it does not sufficiently show residence upon said claim. An examination of the final proof shows that in answer to question No. 5, the claimant said, "Have been away at periods at work for wages in order to support myself and improve the land, and during the time I would be away I had some one on the place at work there for me, at the seasons when the crop had to be attended to. The longest time I was away from the land was five months at one period." No other explanation of absence is given in the cross examination. It is apparent that the proof is deficient and the decision of your office in rejecting the same was correct. Since, however, there is no adverse claim and no evidence of any bad faith on the part of the claimant, I am of the opinion that the proof should be returned to the local land office, with directions to notify the claimant that she will be allowed sixty days from notice hereof, within which to furnish supplementary proof giving satisfactory explanation of the absences from said land. Upon receipt of said proof the local office will duly consider the same together with the proof already submitted. If the claimant fails to submit, within the time specified, the required explanation, her homestead entry should be canceled.

The decision of your office is modified accordingly.

*LOCAL OFFICE—SALARY OF CLERK.***GEORGE C. BENNETT.**

A clerk in a local office, acting under authority of an appointment made by one of the local officers, is equitably entitled to payment for services actually rendered, pending the action of the Commissioner on such appointment.

Secretary Vilas to Commissioner Stockslager, June 23, 1883.

On June 15, 1885, three clerks, George C. Bennett, Louis Schiemann, and W. N. Jackson were employed at the land office at Bismarck, Dakota, and each received an annual salary of \$1,200.

By letter of June 15, 1885, the register and receiver were notified that for the ensuing fiscal year they would be allowed to employ two clerks at the rate of \$1,000 each per annum.

July 1, 1885, the receiver wrote to your office that he had proposed to the register that each should select one of the clerks. The register declined the proposition claiming the right to name them both. Thereupon the receiver administered the oath to George C. Bennett and put his name upon the pay roll; and the register administered the oath to Louis Schiemann and W. N. Jackson, and the name of the first named was placed on the pay roll.

July 9, you wrote to the local office that until the register and receiver could agree no clerk in the office would be recognized, and that in case they failed to agree you would make the appointment.

The local officers did not agree and on September 25, your office directed that William N. Jackson be employed as one of the two clerks. On October 10, you directed the employment of Louis Shiemann as the other clerk. It appears that from July 1, although the three clerks who had served during the preceding fiscal year had been sworn in at the beginning of the new fiscal year and continued in the discharge of their duties, there was no clerk in the office recognized by you until September 25. On this latter date Jackson was employed and from October 10, Shiemann. Until this last named date Bennett had performed the duties of a clerk, having been sworn in by the receiver who placed his name upon the pay roll, and he had as good a standing, until a decision was made by your office, as either of the other two.

November 8, 1885 you rejected the application of Bennett for payment for the services he had rendered from July 1, to October 10, on the ground that his employment had not been authorized by your office.

From this decision the appeal is taken.

The records of your office show that Jackson and Shiemann have been paid for the services performed by them from July 1, to September 25, and October 10, respectively. (Report No. 38683, Division of Accounts). During this period their employment was not authorized by your office; their claim was an equitable one alone. I think the equities in Bennett's favor equally strong.

For the fiscal year ending June 30, 1886, the following appropriation was made: "For incidental expenses of the several land offices \$165,000." (23 Stat. 498).

This amount is distributed by your office under the direction of the Secretary of the Interior as the needs of the service require. The appropriation ledger of your office shows that a portion of this sum—more than enough to meet this claim—remains unexpended subject under the law, to the control of the Secretary.

Bennett having faithfully performed the duties assigned to him is justly entitled to payment for his services. I therefore, reverse your decision and direct the allowance out of the unexpended balance of the appropriation for the fiscal year ending June 30, 1886, of his application to be paid for his services as clerk in the land office at Bismarck from July 1, to October 10, inclusive, at the rate of \$1000 per annum.

PRE-EMPTION ENTRY—RESIDENCE.

RHODA A. McCORMACK.

Land is not excluded from pre-emption because its altitude is such as to prevent residence thereon throughout the entire year.

Secretary Vilas to Commissioner Stockslager, June 22, 1888.

I have before me the appeal of Rhoda A. McCormack, from your decision of November 24, 1886, holding her pre-emption cash entry—No. 1894—for cancellation "for non-compliance with the requirements of (your) office as to continuous residence for six months last prior to making proof".

The land covered by said entry is the SW. $\frac{1}{4}$ of SW. $\frac{1}{4}$, Sec. 35, T. 4 S., and NW. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of Sec. 2, and E. $\frac{1}{2}$ of NE. $\frac{1}{4}$, Sec. 3, T. 5 S., R. 39 E., W. M., La Grande district, Oregon.

The claimant is a widow upwards of sixty-two years of age. She settled on said tract in the "summer of 1881," and made pre-emption proof and payment on the 18th of March, 1884. The cash entry thus made was "suspended by (your) office Feb. 5, 1886, for non-continuous residence." On April 27, 1886, by way of supplementing the formal proof, the claimant and three witnesses (other than those who appeared on the formal proof) submitted to an examination by the register.

By the proofs so taken it appears that claimant, having built a house during '81, began actually to reside therein during May, 1882; that between that date and March 18, 1884, the date of her formal proof, she was actually present upon her claim, regularly inhabiting the same, more than fifteen months, or about two-thirds of the time, she having been absent only during the third of that period in which, owing to the snows, it would have been impossible for her live-stock to find food.

upon the claim, or for her to travel back and forth to and from the tract to sell the eggs and dairy produce, on the proceeds of which she lives, or to purchase necessary provisions, the said claim being a mountain tract which is practically inaccessible in the depth of winter; that during all the time covered by said testimony, including more than two years subsequent to her said cash entry, claimant actually inhabited the tract, and used the same as her home and for grazing and dairy purposes, about nine months in each year, and, on retreating to the valley for the snowy season, left potatoes and other provisions "buried" in the ground, and chairs, dishes and other household articles in the house; that before the date of her formal proof she had on the tract a house, twenty by twenty-two, stable and chicken house, and a garden broken and fenced, all worth, together \$350; that since her formal proof (doing the great bulk of the work herself, she has hauled lumber more than eight miles) broken more land, dug and walled a cellar for storage, got more than 2,000 rails for fencing, and set out shrubbery, gooseberries, raspberries, etc.

As the reason for cancelling her entry, your letter says:

It is questionable whether land in the mountains, so high that residence cannot be maintained thereon throughout to the entire year, is within the contemplation of the pre-emption laws, although it may be surveyed and open to pre-emption sale.

In this view I cannot concur, and in my opinion the proof made would amply justify the issuance of a patent.

Your said decision is accordingly reversed.

WIDOW OF EMANUEL PRUE.

Motion for review of departmental decision rendered December 22, 1887 (6 L. D., 436), overruled by Secretary Vilas, June 23, 1888.

RAILROAD GRANT—CONFLICTING LIMITS—ACT OF MARCH 3, 1871.

COBLE v. SOUTHERN PAC. R. R. Co.

(On Review.)

The Department adheres to its former ruling herein, and holds that lands included within the indemnity limits of the Atlantic and Pacific Railroad Company, were, by the proviso to section 23, act of March 3, 1871, excepted from the grant to the Southern Pacific.

Secretary Vilas to Commissioner Stockslager, June 23, 1888.

The Southern Pacific Railroad Company has filed a motion for review of departmental decision of January 11 (6 L. D., 679), holding that the NW. ¼, Sec. 27, T. 1 N., R. 8 W., S. S. N., Los Angeles, California, did

not pass to said road under the grant of March 3, 1871; and in holding that said tract is subject to entry by Coble under his application, alleging the following grounds of error:

1. Error in holding the Atlantic and Pacific Company had a grant to the land in question upon or under its map filed March 12, 1872.
2. Error in holding said land did not pass under the grant to the Southern Pacific Railroad Company.
3. Error in allowing said Coble to enter said land upon his application of June 29, 1886.

The land in controversy is within the primary limits of the grant of March 3, 1871 (16 Stat., 573), conferring upon the Southern Pacific Railroad Company for the purpose of building a branch line, connecting the Texas Pacific Railroad with the city of San Francisco, the same rights, grants and privileges that were granted to the Southern Pacific Railroad Company under the act of July 27, 1866, "provided, however, that this section shall in no way affect or impair the rights, *present or prospective* of the *Atlantic and Pacific Railroad Company*, or any other railroad company." The map of definite location opposite the land in controversy was filed by the Southern Pacific Company April 3, 1871.

It is also within the indemnity limits of the Atlantic and Pacific Railroad Company, under the grant of July 27, 1866, as ascertained by the map of definite location of said road filed March 12, 1872.

It is insisted by counsel that although the Atlantic and Pacific Railroad Company had a right to locate and construct a railroad, from a point to be selected by that company, on the Colorado River, thence by the most practicable and eligible route to the Pacific, and that a grant of lands was made by said act to aid in the construction of said line of road, yet the Atlantic and Pacific Railroad Company did not locate its road opposite the land in controversy until after the act of March 3, 1871, and the filing of the map of definite location of the Southern Pacific Railroad Company, and when located the tract in controversy fell within its indemnity and not its granted limits: That the Atlantic and Pacific Company did not complete their road opposite to the tract in controversy, and that the act of July 6, 1886 (24 Stat., 123), forfeiting the grant of the Atlantic and Pacific Railroad Company as to all lands adjacent to, and coterminus with the uncompleted portion of said road, did not restore said tract to the public domain but left it subject to the grant to the Southern Pacific Railroad Company, as said latter company could then take said tract without affecting or impairing the rights, present or prospective of the Atlantic and Pacific Railroad Company.

Counsel argue this motion as if it was a question between the roads as to when their respective rights attached under their grants, but in the case now under review the decision of the Department was based upon the ground that the Atlantic and Pacific Company, having the right to locate and construct its line along the route, they therefore had

a prospective right to select lands that fell within the limits of the road as afterwards located, and hence, the Southern Pacific Railroad Company had no right to the same because lands of the character of the tract in controversy were excepted from the operation of the grant to the Southern Pacific Company (branch line) by the proviso above referred to, and hence the forfeiture of the grant to the Atlantic and Pacific Company did not invest the Southern Pacific Company with the right to lands that were excepted from the operation of their grant, following the decision of the Department in the case of *Gordon v. Southern Pacific Company* (5 L. D., 691).

In the *Gordon* case it was held upon the authority of the Assistant Attorney-General in the case of the Texas Pacific Railroad Company and Southern Pacific (Branch line) Railroad Company (4 L. D., 215) that:

Under Sec. 23, of the grant of March 3, 1871, lands embraced within the indemnity withdrawal for the Atlantic and Pacific Railroad were *excepted* from the grant to the Southern Pacific Railroad Company.

In that case the lands in controversy were within the granted limits of the Southern Pacific Railroad Company, as shown by the map designating the route of said road filed April 3, 1871, and within the indemnity limits of the Atlantic and Pacific Railroad Company as shown by the map of said road filed March 12, 1872, and hence they were in precisely the same condition, so far as they were affected by the grants to said roads as the lands involved in this case.

On March 2, 1888, this Department submitted to the Attorney General for his opinion thereon, the following question:

Whether the proviso to the twenty-third section of the act of the 3rd of March, 1871 (16 Stat., 573), excepted from the operation of said grant lands within the primary limits of said road, where said lands fall also within the primary or indemnity limits of the Atlantic and Pacific Railroad Company now forfeited, and whether said lands can be restored to settlement and entry under the general land laws?

The opinion of the Attorney General has been filed in the Department in which he holds that:

This section constitutes the grant of all the rights the Southern Pacific Railroad Company has to public lands for the branch line described in it. No subsequent legislation has either added to or diminished the rights of that company. Whatever rights the company had along the main line of its road under the act of July 27, 1866, are extended to this branch line, subject to the same limitations, restrictions, and conditions that are attached to it in the original grant, with the additional exception stated in the proviso. By that proviso all rights and privileges that would in 'any way affect or impair the rights, present or prospective,' of the Atlantic and Pacific Railroad Company are excepted by the enactment from the grant to the Southern Pacific Company, and as to any such right or privilege thus excepted, no claim of any kind was ever vested in the Southern Pacific Company. The rights that were granted to the Atlantic and Pacific Railroad Company in their full breadth as set forth in the act of July 27, 1866, are excepted by the proviso. The exception includes all the rights, both present and pros-

pective, of the Atlantic and Pacific Company. The rights excepted are those which on the 3rd of March, 1871, *existed*, and those which the legislation as it then stood *promised* to the Atlantic and Pacific Company.

Without stopping to consider the question as to whether or not this construction given to the said 23rd section of the act of March 3, 1871, by my predecessor and the Attorney General is the correct one, and because the determination is open to judicial review, I believe that the ends of justice can be best subserved by leaving said company to seek in the courts its remedy for any possible injury it may have sustained in the premises. I therefore decline to disturb the former ruling of the Department, and the motion for review is accordingly denied.

RAILROAD GRANT—SPECIAL INDEMNITY—ACT OF JUNE 22, 1874.

CENTRAL PAC. R. R. CO.

The right to select indemnity under the act of June 22, 1874, should not be considered in the absence of an application to select a specific tract in lieu of that relinquished.

Secretary Vilas to Commissioner Stockslager, June 23, 1888.

On June 26, 1886, the Central Pacific Railroad Company executed a relinquishment under the act of June 12, 1874 (18 Stat., 194), to Lots 3 and 4, and the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ Sec. 5, T. 11 N., R. 2 W., Salt Lake City, Utah land district, in favor of Thomas W. Fryer, homestead entryman for said land.

In your office letter of September 23, 1886, to the attorney for said company, it was said "I have considered the question of special indemnity asked for in the release under the act of June 22, 1874."

After discussing the facts it was decided that the tracts relinquished were excepted from the grant to the company, that for that reason the company had no claim to relinquish and therefore "the application for special indemnity cannot be allowed."

The company appealed from that ruling.

In the relinquishment filed the company does not ask for indemnity nor do I find among the papers an application by the company for any land as indemnity for the tracts relinquished. Until such an application is made the right of the company to indemnity should not be considered.

The decision of your office on this question was premature, and the same is hereby reversed, and the company will be allowed to present its application to select specific tracts in lieu of those relinquished when "all the facts connected with these selections, both as to the condition of the land asked for and the validity of the company's claim to the land relinquished," will be considered. Winona & St. Peter R. R. Co. v. Warner (6 L. D., 611).

*RAILROAD GRANT—CONFLICTING LIMITS—WITHDRAWAL.***SOUTHERN PAC. R. R. Co.**

Priority of grant determines the right to lands within common granted limits.

The odd numbered sections within the indemnity limits of the grant to the Atlantic and Pacific, and the primary limits of the Southern Pacific, were excepted from the grant to the latter company by the proviso to the twenty third section of the act of March 3, 1871.

Lands granted to one company are not subject to selection as indemnity by another. The unpatented odd numbered sections within the granted limits of the Atlantic and Pacific, and the granted and indemnity limits of the Southern Pacific, are restored to settlement and entry.

The withdrawal covering lands within the granted limits of the Southern Pacific, and the indemnity limits of the Atlantic and Pacific is continued in force.

Proceedings directed for the vacation of patents erroneously issued to the Southern Pacific, for lands excepted from its grant by reason of conflict with the prior grant to the Atlantic and Pacific.

Secretary Vilas to Commissioner Stockslager, June 23, 1888.

On the 19th of May last, the Department referred to your office, for report thereon, the application of Mr. Joseph K. McCammon, attorney for the Southern Pacific Railroad Company, requesting that the same course may be adopted with reference to lands claimed by the Southern Pacific Railroad—Branch Line—that was taken with reference to lands claimed by the Union Pacific Railroad Company, lying southwest of Denver. That is, that the Southern Pacific Railroad Company be called on, under the act of March 3, 1887, for a reconveyance of the lands which are held to have been improperly patented to said company, so that upon a refusal to reconvey, suits may be brought to set aside such patents, and that no further patents shall issue to said company for lands in the limits of the forfeited grant to the Atlantic & Pacific Railroad Company; and that the subsisting withdrawal of lands within the primary or twenty mile limit of the Southern Pacific Railroad (Branch line) which are also within the granted and indemnity limits of the Atlantic & Pacific Railroad shall remain undisturbed until the rights of the company can be determined by suits before the courts.

You state in your report that patents have been issued to the Southern Pacific Co. for 60,393.33 acres of land lying within the common primary limits of both roads, and that patents have also been issued for 19,789.58 acres of land lying within the primary limits of the Southern Pacific Railroad and the indemnity limits of the Atlantic & Pacific Railroad Company.

In addition to these, patents have also issued to said company for 8,774.68 acres of land lying within the indemnity limits of their grant and within the primary limits of the Atlantic & Pacific Railroad Company.

It is alleged by the attorney for the company, that the company has sold a large quantity of selected and unselected lands within both the

primary and indemnity limits of said road. It is this class of lands that the company request may be kept in reservation until a judicial determination of the right of the company to said lands, which may be sufficiently determined in a suit to vacate the title of the company to land of the same character for which patent has already issued.

The lands involved are of three classes.

1. Lands within the common primary limits of the grant to the Atlantic and Pacific Railroad Company and of the grant to the Southern Pacific Railroad Company. (Branch Line.)

2. Lands within the primary limits of the grant to the Southern Pacific Railroad Company—(Branch Line)—and within the indemnity limits of the grant to the Atlantic & Pacific Railroad Company.

3. Lands within the indemnity limits of the grant to the Southern Pacific Railroad Company—Branch Line—and within the primary limits of the grant to the Atlantic & Pacific Railroad Company.

As to the lands embraced within the first class, you recommend that suits be brought to annul the patents heretofore issued, and that all pending selections of similar lands be canceled and with other unpatented lands within said limits be restored to settlement and entry; and that the request of the railroad company that said lands be held in reservation until the rights of the company to said lands may be determined by the courts be denied.

As to these lands your recommendation is based upon the authority of the supreme court in the cases of *Missouri Kansas and Texas Ry. Co. v. Kansas Pacific Ry. Co.* (97 U. S., 491) and *St. Paul and Sioux City R. R. Co. v. Winona and St. Peter R. R. Co.* (112 U. S., 720), that priority of grant and not priority of location or construction gives priority of right, and, therefore, the prior grant to the Atlantic & Pacific Railroad Company "prevented the attachment of the right of the Southern Pacific company to any lands within the Atlantic & Pacific company's granted limits thereby defeating, as to said lands, the grant to the Southern Pacific Railroad Company."

Under the rulings of the supreme court in the cases above cited the right of the Atlantic & Pacific Railroad Company by virtue of its prior grant attached to all the lands within said limits that were of the character contemplated by the grant at the date of definite location to the exclusion of the right of the Southern Pacific Company to any part of said lands under its grant of March 3, 1871 (16 Stat., 573).

In the case of *Gordon v. Southern Pacific R. R. Co.* (5 L. D., 691), the Department, adopting the views of the Assistant Attorney General as expressed in his opinion in the case of *Texas Pacific R. R. Co. and Southern Pacific R. R. Co.* (4 L. D., 215) held, that the proviso to the twenty-third section of the act of March 3, 1871, excepted from the operation of said grant all lands to which the Atlantic & Pacific Railroad Company had a right either present or prospective. This ruling was followed

by the Department in the case of Wesley Coble, (6 L. D., 679 and 812) and also in the case of J. M. Voss, decided December 10, 1887.

It was also concurred in by the Attorney General in his opinion of April 16, 1888.

In a communication addressed to your office on November 25, 1887 (6 L. D., 349), relative to the adjustment of the grant to the Southern Pacific Railroad Company, the Department held that the forfeiture of the grant to the Atlantic & Pacific Railroad Company did not invest the Southern Pacific Company with any greater right or interest than said company had at the date of forfeiture, but that "the act of forfeiture divested the Atlantic and Pacific Company of all right, title and interest in said lands and re-invested the title in the government."

Upon the principles announced in the cases above cited, I think it clear that said patents were erroneously issued, and that proceedings should be instituted to vacate the patents so erroneously issued.

What has been said with reference to the lands in the first class will apply equally as well to lands in the second class, if the decision of the Department in the case of *Gordon v. Southern Pacific Railroad Company* (*supra*) is a correct construction of the twenty-third section of the act of March 3, 1871. In that case the Department held that lands within the indemnity limits of the Atlantic and Pacific Railroad were excepted from the operation of the grant to the Southern Pacific Company by the proviso to the twenty-third section of the act of March 3, 1871, although said lands fell within the granted limits of the Southern Pacific Railroad, because the Atlantic and Pacific Railroad had a prospective right of selection of said lands, whenever its grant should be located. While I doubt if the reservation of "prospective" rights prevented the attachment of the grant of the Southern Pacific Company to lands in place, I am not disposed to disturb this ruling, believing that it is better to leave this point to be settled by the courts.

As to lands embraced in the third class, it has been settled by the supreme court that lands granted to one company are not subject to selection as indemnity by another company (112 U. S., 414; 117 U. S., 406), and I concur in your opinion that proceedings should be instituted to vacate the patents erroneously issued for such lands.

It is now urged by the company that as the Department in issuing patents for lands embraced in each of the classes above mentioned, decided that the company was entitled under its grant to said lands, the same rule should therefore prevail as to all the lands embraced in the several classes, that was adopted in the case of the Union Pacific Railroad as to its lands southwest of Denver. In that case the right of the company to the lands claimed depended upon whether the Denver Pacific and the Kansas Pacific railroads formed a continuous line, or whether both lines terminated at Denver.

The Department had approved a location of the road as one continuous line, and upon this theory the grant was adjusted and patents issued.

The right of the Union Pacific Railroad Company to have its grant adjusted as one continuous line had not been passed upon by the courts, and in that case it was thought a wise exercise of administrative discretion to withhold all lands from settlement until the rights of the company could be determined by the courts.

In the present case, as to the lands lying within the granted limits of the Atlantic and Pacific Railroad Company, the decisions of the supreme court in the cases heretofore cited, (97 U. S., 491, and 112 U. S., 720) are conclusive against the right of the Southern Pacific Railroad Company to any of the lands within said limits, and I therefore concur in your recommendation, that the unpatented lands within said limits—that is, the lands embraced in the first and third class—shall be opened to settlement and entry.

As to the lands embraced within the second class—that is, of lands within the granted limits of the Southern Pacific Railroad Company and within the indemnity limits of the Atlantic and Pacific Railroad Company—in view of the doubt heretofore expressed, I concur in your recommendation that there can be no objection to continuing in reservation the unpatented lands of this class, pending adjudication by the courts, or until such time as the Department may deem it proper to remove the reservation.

PRIVATE ENTRY—OFFERED LAND—TEMPORARY SEGREGATION.

JOHN O'DEA.

The cancellation of a *prima facie* valid timber culture entry covering offered land, does not render said land subject to cash entry.

A timber culture entry regularly made, though covering land not subject thereto, while of record segregates the land from the public domain.

Secretary Vilas to Commissioner Stockslager, June 23, 1888.

I have considered the appeal of John O'Dea from your decision, dated February 18, 1887, rejecting his application to make private cash entry for the NE. $\frac{1}{4}$ of NE. $\frac{1}{4}$, Sec. 20, T. 17 N., R. 13 E., Neligh, Nebraska.

The record shows that said application was made January 4, 1884, and was on the same day rejected by the local office, for the reason that "the tract applied for is not subject to private entry, it having been withdrawn from market by reason of timber culture entry, No. 848, made March 25, 1880, by John Fitzgerald. Said entry was canceled by relinquishment October 28, 1880." From said rejection O'Dea appealed to your office, which, finding the facts to be as stated by the office below, affirmed its action.

O'Dea appeals to the Department, and claims that he is entitled to make private cash entry as applied for, because the section in which the tract lies was not at the date of the timber culture entry, in 1880, devoid of timber; that therefore said timber culture entry was void

and did not segregate the land, nor take it out of the list of offered lands, so as to prevent its being legally and properly purchased under a private cash entry. The land was offered July 15, 1859. The contention of appellant can not be sustained. The timber culture entry was regularly made—was accompanied by the requisite affidavit that the section was devoid of timber, and was therefore *prima facie* valid.

It was canceled by voluntary relinquishment, but had it not been so canceled, its cancellation on the ground suggested could have been procured only after a hearing and the production of evidence overcoming the affidavit of the entryman and such evidence as he might offer for the purpose of showing that the section was devoid of timber.

Such being the case, the timber culture entry was not void, but voidable, and while of record worked a segregation of the land. It follows that, after its cancellation, the tract was not subject to private entry, and your decision rejecting the application of O'Dea is affirmed.

RAILROAD INDEMNITY—ACT OF JUNE 22, 1874.

HALGRIN TOSTENSON.

The right to indemnity for land relinquished under the act of June 22, 1874, will not be considered until application is made to select specific tracts in lieu of those relinquished.

Though a relinquishment under said act may not be authorized, such fact should not affect a prior entry of the land where there are no indications of bad faith on the part of the entryman.

Secretary Vilas to Commissioner Stockslager, June 23, 1888.

I have considered the appeal of Halgrin Tostenson from your office decision of July 8, 1886, holding for cancellation his adjoining farm homestead entry for the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, Sec. 13, T. 116 N., R. 37 W., Benson, Minnesota land district.

This land is within the ten mile (granted) limits of the Hastings & Dakota Railway Company under the act of July 4, 1866 (14 Stat., 87), under which act the rights of the grantee are held to have attached June 26, 1867, the date when the map of definite location was accepted.

Halgrin Tostenson made adjoining farm entry for said land October 22, 1885, and on December 22, 1885, submitted final commutation proof thereunder, showing residence from April 15, 1883. This proof was by the local officers approved, the purchase money paid by the claimant and final certificate issued to him.

On February 5, 1886, the Hastings & Dakota Ry. Co. executed a relinquishment under the act of June 22, 1874 (18 Stat 194) of all its claim to said land, together with a number of other tracts similarly situated.

In reply to your office letters in regard to these entries and relinquishments the local officers reported by letter of June 25, 1886, that these

entries were for "additional homestead entries—act of March 3, 1879—adjoining farm homesteads, or for lands upon which settlement and improvement have been made for years, in fact, prior to any selections made by the St. Paul, Minneapolis & Manitoba Railway Company, or their predecessors, and of such class of lands as this office has for years been frequently called upon to give information regarding the same. The railway company have, we are informed, had like inquiries, and to overcome the difficulty the Hastings & Dakota company by their attorney, informed this office that the company would relinquish such lands under the act of June 22, 1874. Considering this matter to be of interest to the settlers, we have, in such cases permitted entries and filings, but in no case have we allowed such entries or filings unless the party could, if he so desired, make good and sufficient proof at once or as soon as proper notice could be given."

Thereupon it was decided by your office that the action of the local officers in admitting the entries "was manifestly improper and contrary to established practice and well known regulations," that "the transactions in connection with the entries and relinquishments under consideration indicate that an actual attempt has been made to carry out a scheme for the enlargement of the Hastings and Dakota grant, and that the district land officers, either through ignorance, dishonesty, or excessive sympathy with the settlers have been induced to lend their services to the promotion of its success;" the entries were held for cancellation and the relinquishments rejected "because the entrymen named are not entitled to the relief provided by the act of June 22, 1874."

I cannot find that the facts shown in this case establish bad faith on the part of the entryman, or that his entry should be canceled, he having paid the purchase money for the land and final certificate having been issued. The railway company has relinquished all claim to this land but its right to indemnity for the tracts so relinquished is not now before me, and therefore, it is not necessary to pass upon the motives that led the company to make the relinquishment as all questions in relation thereto will be properly considered when it applies to select specific tracts, in lieu of those relinquished.

By letter of July 12, 1886, the local officers advised you that their report of June 25, upon which your office decision rests, was incorrect and ask "that this letter be substituted in place of the letter of June 25, 1886."

This letter is as follows:

Referring to your letter "F" dated July 2, 1885, we have to report that at the time of making report to your office letters "F" dated March 25,—April 16,—and June 10, 1886, June 25, 1886, we could only surmise a reason for the allowance of the entries on odd sections, as described in the former letters, referred to, because of the absence of the former ex-register of this office; we have to report that since writing the letter dated June 25, 1886, the former ex-register has been here,

and we have conversed with him upon the subject, and he states that, 'The reason he allowed the entries was, that the lauds in his opinion, are government lands; that they are within the 20-mile, or indemnity limits of the St. Paul and Pacific, now the St. Paul, Minneapolis and Manitoba-main-line-railway, withdrawal for which become effective in this office July 20, 1865. That the lands are also within the 10-mile granted limits of the Hastings and Dakota railway, withdrawal for which become effective in this office August 8, 1866, and that the entrymen for these lands, had, prior to any selection by the St. Paul and Pacific Company, or its successors, the St. Paul, Minneapolis and Manitoba Railway Company, acquired inceptive rights, by settlement and improvements of the lands, and that the Hastings and Dakota Railway Company failed to construct their road opposite these lands, within the statutory period, 14 Stat., 87—therefore, had forfeited all rights, they might have otherwise had. That he was, therefore, of the opinion that neither of said companies had any rights to said lands, and for this reason he allowed the entries, but, that he thought it best for the interest of the settlers to ask the company, in whose granted limits the land fell for a relinquishment, that the settlers might be saved the expense of a contest with the railway companies; but in his opinion, the companies are not entitled to lands in lieu of the same, nor was any of the entries allowed on account of the railway companies, or either of them, relinquishing, or agreeing to relinquish, any of these class of cases'.

We fully concur in the opinion of the ex-register, and have to report that our reasons given, in letter of June 25, 1886, for allowing the entries was erroneous, and was hastily written to comply with your request. We should have deferred the matter until we could have seen, or heard from the ex-register of this office, in which event our letter of June 25, 1886, would have been, in substance the same as this letter, and we ask that this letter be substituted in place of the letter of June 25, 1886; and we would further state that *all* the entries made, ... for the lands in question were allowed under the conclusions herein stated, and not as stated in our letter of June 25, 1886.

This report satisfactorily explains the action of the local officers in allowing this entry and tends to remove all suspicion as to the good faith of the entryman.

It is said in your office decision that this tract was "selected October 11, 1871, by the St. Paul, Stillwater and Taylor's Falls Railroad Company on account of the St. Paul, Minneapolis and Manitoba Railway grant by virtue of an agreement between it and the original grantee, and the selections appear intact on the official records. The land is not in the limits of the grant on account of which selected. The selections were, therefore, illegally admitted and are hereby held for cancellation."

There was no appeal by the parties adversely affected by that part of your said office decision, and the same has therefore become final.

The entry of Tostenson will, in accordance with the views herein expressed, be allowed, and it is directed that patent issue thereon if the final proof is found, upon examination in your office, to be regular and sufficient.

Your said decision is accordingly modified.

PRE-EMPTION—DEATH OF PRE-EMPTOR—FINAL PROOF.

WILLIS E. DODGE.

On the death of a pre-emptor, final proof should be made for the benefit of the heirs of the deceased, and not for one of said heirs, claiming as sole legatee.

Secretary Vilas to Commissioner Stockslager, June 25, 1888.

I have before me the appeal of Willis E. Dodge from your office decision of December 20, 1886 involving the SE. $\frac{1}{4}$ of Sec. 8, T. 142 N., R. 65 W., Fargo land district, Dakota.

The record shows the following facts. One William B. Dodge filed declaratory statement for the said lands April 19, 1883, alleging settlement April 11, the same year. Before consummating his claim he died April 30, 1884, leaving surviving him a wife, daughter and two sons of whom the said Willis E. Dodge was one. He died testate; his will was admitted to probate by the proper court May 21, 1884. The deceased in his said will devised his interest in said land to his son Willis E. Dodge, also appointing the latter sole executor. Thereafter, July 30, 1884 the latter made and submitted the final proof as *devisee* of William B. Dodge deceased. The local office accepted the proof and issued cash certificate thereon to Willis E. Dodge sole legatee of William B. Dodge deceased.

Your office decided in letter December 20, 1886, that the entry was illegal, that it should have been made in the name of *the heirs* of the deceased pre-emptor and that the local officers erred in allowing the entry to be made by Willis E. Dodge sole legatee of the said deceased.

The proof should have been made by the executor, or one of the heirs *as such* and the cash certificate issued by the local officers to the heirs of the deceased pre-emptor in general terms, not by their names, for your office will not, nor will this Department investigate and determine who are the heirs and what their respective rights are; the patent, if it eventually should be issued, would inure to the heirs, as if their names had been specially mentioned, Sec. 2269, Revised Statutes.

Your decision is therefore affirmed, but this will not prevent the submission of new proof in accordance with the opinion above expressed.

PRACTICE—ABANDONMENT OF CONTEST.

JAMES W. CONNERS.

A stipulation indefinitely postponing a contest, followed by a delay for years to prosecute the same, must be treated as an abandonment thereof.

Secretary Vilas to Commissioner Stockslager, June 25, 1888.

I have considered the appeal of James W. Connors from your decision of October 11, 1886, rejecting his claim to a preference right of

contesting the homestead entry of John F. Lemke, No. 756, made May 16, 1881, for the E. $\frac{1}{2}$ of SE. $\frac{1}{4}$, the SW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ Sec. 1, and the NW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ Sec. 12, all in T. 13 S., R. 3 W., S. B. M., Los Angeles land district, California.

Appellant alleges that in the month of August, 1883, he made an application to enter under the homestead act the land in question, and to that end he "filed an affidavit of contest and such proceedings were had that one attorney Cushing entered appearance for A. Schneider, as administrator of the estate of said Lemke, deceased." Said attorney represented to said Conners that the only heir of said deceased entryman was a minor, in whose behalf the land would be occupied and cultivated; that thereupon at the solicitation of said attorney, he, Conners, signed a stipulation continuing the contest until called up by notice of the opposite party. Appellant further testifies that since August, 1883, he has been the only person in possession of the land. In the meantime, another application to contest said entry has been presented by one Israel, and appellant asks to be recognized as the prior contestant. This can not be done. The stipulation indefinitely postponing contest, followed by a delay for years to prosecute the same, must be treated as an abandonment thereof.

Your decision is affirmed.

SCHOOL LANDS—INDEMNITY SELECTION.

STATE OF CALIFORNIA.

Indemnity cannot be allowed for losses alleged in an unsurveyed township.

Secretary Vilas to Commissioner Stockslager, June 25, 1888.

I have examined the appeal filed by the counsel for the State of California from the decision of your office, dated May 23, 1886, rejecting the application of said State to make indemnity school selections of certain lands therein described, for those lost in township 15, ranges 34 and 35, and township 16, range 34, Bodie land district, in the State of California.

Your office found that the tracts claimed as basis are within the Mount Whitney military reservation, created by Executive order, dated September 20, 1883; that the lands in said reserve are described in said order by townships and parts of townships; that the public surveys have not been extended over the lands included in said reserve, and no sections numbered sixteen and thirty-six have been found therein; that because of the fact that said lands have not been surveyed, said application for indemnity must be rejected.

Counsel for the State, in their appeal, allege that your office erred in stating in that "the public surveys have not been extended over the lands embraced in the reserve, and that no sections numbered sixteen and

thirty-six have been found therein; that the township lines have been so extended over the locality as to render it easy of ascertainment and demonstration that the school sections, as indemnity, for which these lands are sought, do fall within the reservation," and error in rejecting said application.

The only evidence of error, as to the survey, in said statement is the bare allegation of counsel, unsupported by any transcript of the records of your office. An inspection, however, of the plats of survey on file in your office shows that townships 15 and 16, range 34, have not been surveyed, and a part only of township 15, range 35, which does not show section 36, used as a basis in said application, has been surveyed.

It thus appearing that the township lines of survey have not been extended over said township, I am of the opinion that the rejection of said application by your office was correct. Said decision must be, and it is hereby, affirmed.

PRACTICE—INITIATION OF CONTEST.

BOLSTER v. BARLOW.

A contest cannot be considered as initiated until the affidavit of contest is received and accepted by the local office.

Where the date of filing a contest affidavit cannot be determined from the record, such affidavit will be held to have been accepted on the date when the notice of contest issued.

If the default is cured prior to the initiation of contest the entry will not be canceled.

Secretary Vilas to Commissioner Stockslager, June 25, 1888.

I have considered the appeal of Nathaniel Bolster from your office decision of August 28, 1886, dismissing his contest and sustaining the timber culture entry No. 116 of Charles A. Barlow, made November 17, 1883, for the SE. $\frac{1}{4}$ of Sec. 30, T. 26 S., R. 15 E., San Francisco land district, California.

Bolster, as contestant, furnished information to the local office, which was accepted and notice of contest was issued February 25, 1885. In his affidavit of contest Bolster alleges that Barlow failed to break or cause to be broken five acres of land on said tract, and had done nothing of any kind upon the land during the first year.

Contestant appeals from your said decision, and assigns as error:

1st. In holding that the contest was not initiated until subsequent to February 13, 1885.

2d. In holding that at the date of the contest the required amount of land had been plowed.

Neither of these assignments is well taken. A contest can not be considered as initiated, until the affidavits of contest are received and accepted by the local office. *Hayes v. Gilliam* (11 C. L. O., 83); *Hous-*

ton *v.* Coyle (2 L. D., 58); Gotthelf *v.* Swinson (5 L. D. 657); Rules 2 and 3 of Rules of Practice.

The affidavit of contest executed by contestant does not give the date of the day or month when it was executed, but the joint affidavit of the corroborating witnesses, on the back of contestant's affidavit, bears date February 13, 1885. These affidavits were not executed before the register or receiver, but were forwarded by mail. No evidence showing when they were received at the local office, they can only be deemed to have been accepted by the local officers on the date when the notice of contest was issued.

The testimony shows, and you so found that Barlow employed a man and paid him to break five acres, and that the man so employed did the plowing on the land in September, 1884, the ground at the time being dry and hard, the plowing was fairly done; that in February, 1885, the claimant plowed ten acres, including the five acres plowed in 1884, and sowed the five acres previously broken to wheat; that the second plowing was well done, the work being completed February 13, 1885, the day upon which it appears the corroborating affidavits of contest were executed. Whatever laches the entryman may have been guilty of, were cured prior to the institution of contest, and the contest should therefore have been dismissed.

Shoemaker *v.* Lefferdink (4 L. D., 368); Fitch *v.* Clark (2 L. D., 262); Worthington *v.* Watson (*Ibid.*, 301); Galloway *v.* Winston (1 L. D., 142); Williams *v.* Price (3 L. D., 486).

I find no error in your said decision, and the same is accordingly affirmed.

SETTLEMENT BEFORE SURVEY—JOINT ENTRY.

COLEMAN *v.* WINFIELD.

The final proof of both parties must be submitted before an award of joint entry can be made.

The extent of the possessory right of each party being fixed and determined by recognized boundaries, either of said parties may make entry of the whole tract in conflict, on condition that he tenders to the other, an agreement to convey to him that portion of the land covered by his occupation.

If both parties fail or refuse to make entry on the terms thus prescribed, then joint entry may be made in accordance with the provisions of section 2274 of the Revised Statutes.

Secretary Vilas to Commissioner Stockslager, June 26, 1888.

I have considered the case of Lawrence S. Coleman *v.* Martin Winfield, on appeal by Winfield from your office decision of February 5, 1886, allowing these parties to make joint entry of the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 11, and the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 12, T. 15 S., R. 95 W., of the 6th P. M., in the Gunnison, Colorado, land district.

Township plat was filed July 2, 1834. On July 7, 1884, Coleman filed declaratory statement No. 92, Ute series, for the S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 1, and NE. $\frac{1}{4}$ NE. $\frac{1}{4}$ Sec. 11 and NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 12, alleging settlement November 12, 1831.

On September 1, 1884, Winfield filed declaratory statement No. 87, Ute series, for W. $\frac{1}{2}$ NE. $\frac{1}{4}$, and NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ Sec. 11, and NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ Sec. 12, alleging settlement November 20, 1881.

Winfield after due notice offered final proof October 9, 1884, against which Coleman filed protest. A hearing was had before the local officers who decided, that the parties should be allowed to make joint entry. On appeal by Winfield your office affirmed that decision.

The testimony shows that these parties both settled upon the land in dispute prior to survey, and occupied up to certain lines recognized by both as boundary lines between their claims. The amount of land claimed and occupied by Coleman on the disputed tracts is small, as compared with that claimed and occupied by Winfield. It is also shown that Coleman's improvements are much less in amount and value than those of Winfield. The fact remains however, that each had prior to survey, made a settlement and placed some improvements on each of the tracts in dispute, and therefore under the rulings of the department a joint entry should be awarded.

Your attention is called to the fact that Coleman had not at the time of the hearing and has not yet, so far as I am informed, offered final proof under his filing. Coleman will be required to offer his final proof showing compliance with the pre-emption laws and regulations thereunder within sixty days from notice of this decision, and in the event of his failure to do so, Winfield will be allowed to complete his entry according to his filing.

As the portion of the tract in dispute, occupied respectively by Winfield and Coleman, seems to be correctly ascertained by certain lines recognized by both as boundary lines between their claims, I direct that, if Coleman submits final proof in compliance with the above requirement, then Winfield will be permitted to make entry of the entire tract upon the condition that he tenders to Coleman an agreement in writing to convey to Coleman that part of the tract claimed and occupied by Coleman, and if he declines to enter into such agreement, then Coleman may make entry of the entire tract, upon the condition that he tenders to Winfield an agreement to convey that portion of the tract in dispute claimed and occupied by Winfield. If both parties fail or refuse to make entry upon the terms and conditions herein prescribed, then the parties will be allowed to make joint entry, in accordance with the provisions of Sec. 2274 of the Revised Statutes. If Coleman fails or refuses to submit final proof within the time herein required, then Winfield will be allowed to make entry of the entire tract.

Your said office decision is, with the modifications indicated herein, affirmed.

*PRACTICE—SPECIAL AGENT'S REPORT—PREFERENCE RIGHT.***PERKINS v. ROBSON.**

A party furnishing information as the basis of a special agent's report, does not secure thereby a preference right of entry in the event that subsequent action on said report results in cancellation.

Secretary Vilas to Commissioner Stockslager June 26, 1888.

I have considered the case of Cyrus E Perkins v. Jay J. Robson, on appeal by Perkins from the decision of your office, dated September 30, 1886, canceling his homestead entry, No. 16,470, of the SW. $\frac{1}{4}$ of Sec. 3, T. 130 N., R. 55 W., Fargo land district, in the Territory of Dakota.

The record shows that timber culture entry, No. 7758, of said tract, made December 2, 1882, by Charles E. Horton was held for cancellation, upon special agent's report, by your office on August 22, 1885, and finally canceled, by your office letter, dated January 21, 1886.

Said Robson, on January 27, 1886, presented his application to enter said tract under the timber culture law, and the same was rejected by the local office, for the reason that "the land embraced therein is appropriated by timber culture entry, No. 7758, of Charles E. Horton." Robson appealed, and alleged that the local office erred in not allowing said application, subject to the entry of record, as the applicant had assisted the special agent in procuring evidence against the said entry of Horton.

On March 11, 1886, the local land officers allowed said Perkins to make homestead entry of said land.

In response to your office letter, dated September 6, 1886, the local office, on the 13th of the same month, advised your office that their "records show (we don't save envelopes) the cancellation of the entry in question on January 21, 1886, at 4 P. M. Probably the cancellation was noted on the same day of the receipt of your letter, for it is no unusual thing to receive letters from your office that were mailed in Washington four or five days after their date;" that it has been impossible for the correspondence clerk of said office to obtain possession of the tract books during office hours, and, hence, he failed to duly note the application upon the records of the local office.

Your office found that, as a matter of fact, said tract was legally subject to entry at the date of the application of Robson, and held that it would be a hardship to put him to any further inconvenience in the matter; that his application must be received upon the payment of the usual fee and commissions, and that Perkins's said entry must be canceled, "as improperly made, illegal and of no effect."

The appellant insists that it was error to cancel his said entry, for the reason that he was the first legal applicant for said land, after the same became subject to entry, and that Robson was not a contestant and

hence could acquire no preference right to enter said tract by reason of the cancellation of said prior entry.

It is to be observed that Robson in his appeal from the rejection of his said application, based his right of entry upon the fact that he had furnished the special agent with the information upon which he made his report recommending the cancellation of Horton's entry. But he did not appear as a contestant. No notice was issued, no hearing had, and the only evidence that Robson furnished said agent was his own ex-parte affidavit. The entry was held for cancellation upon the agent's report, and finally canceled for failure of the entryman, after due notice, to apply for a hearing.

Robson could gain no rights by virtue of the cancellation of the entry. If, however, Horton's said entry was canceled at the date of Robson's said application, and his application was duly made, then the subsequent entry of Perkins would be subject to the prior application of Robson.

Since it is not shown when the order of cancellation of Horton's said entry reached the local office, nor does it affirmatively appear from the record that the application of Robson was complete and the fees paid or duly tendered to the local land office, yet in view of the valuable improvements made by Perkins, I am of the opinion that a hearing should be ordered to determine the rights of the respective parties. You will, therefore, please direct the local office to order a hearing, after due notice, and they will advise Perkins that he will be allowed to show cause why his said entry should not be canceled and Robson's application to enter under the timber culture law be received, to date from the day it was offered at the local land office.

The decision of your office is modified accordingly.

TIMBER CULTURE CONTEST—FAILURE TO BREAK.

VARGASON v. McCLELLAN.

Credit cannot be allowed for breaking done by a former entryman, where such work has been in no manner utilized by the claimant.

Failure to break the entire amount required the first year does not necessarily call for cancellation on contest, where it appears that the entryman has acted in good faith; nor does the right of the contestant in such a case preclude a determination therein upon principles of equity.

The case of *Linderman v. Wait* cited and distinguished.

Secretary Vilas to Commissioner Stockslager, June 26, 1888.

I have considered the case of Charles Vargason v. William A. McClellan, involving the SW. $\frac{1}{4}$ of Sec. 2, T. 104, R. 43, Worthington district, Minnesota.

McClellan made timber-culture entry of the tract April 3, 1884. Contest was initiated April 8, 1885, upon the allegation that the entryman

had "failed to break or plow five acres during the first year after entry."

The evidence shows that the defendant hired one W. G. Bernard to break five acres, and paid him for breaking that amount. Bernard testifies:

I agreed to plow about five acres for Mr. McClellan, about the first of October, 1884. I sent a man there—a boy of mine—with my team to do the plowing. I know that he plowed some. Mr. McClellan paid me for plowing five acres. I first learned that there was not five acres of plowing after this contest was ordered.

The amount actually plowed was two and three quarters acres.

There is no question as to the perfect good faith of the entryman.

Some former occupant had planted a portion of the tract to trees, at least as long ago as 1880. The amount covered by said trees at the date of hearing was equivalent to between two and one-half and three acres. These trees were considerably scattered—a prairie fire having run through and destroyed many of them. There remains between four and five hundred trees, from five to fifteen feet high. McClellan now seeks to take advantage of the departmental ruling in the case of *Gahan v. Garrett* (1 L. D., 137), *Clark v. Timm* (4 L. D., 175), and others to the same effect, wherein an entryman was allowed credit for work done by a previous occupant who had relinquished or abandoned the tract.

Contestant contends that these rulings are not applicable, but rather that in the case of *Donley v. Spring* (4 L. D., 542), wherein it is said that "it would be plain defiance of the letter and spirit of the timber culture law to allow" the entryman "any credit for the so-called breaking of a former entryman, which he had in no way sought to utilize, save for the purpose of evading the requirements of the law."

The law requires that final proof must show "at least six hundred and seventy-five living and thrifty trees to each acre."

In my opinion the entryman can not properly claim credit for the three acres of breaking done by some one else several years before, but now grown up to grass and weeds and scattering trees—said trees being in number less than one-fourth as many as the law demands, and having been left by the entryman uncultivated and uncared for in any manner.

Notwithstanding, however, the actual failure to break the full amount of five acres during the first year, it is not necessary that this entry should be canceled, nor is there any such requirement in the law. If the failure had been wilful, or in bad faith, or inexcused, it would have been proper to cancel the entry for that reason. But inasmuch as the entryman acted in good faith, paid for breaking the five acres, and the failure was due to the default of his workmen; and especially because the defect is one which may easily be cured so far as the ultimate result of the growth of trees is concerned; and especially because there is nothing in the right of the contestant to entitle him to require

the United States to deny the entryman the privilege which would otherwise be afforded in equitable consideration and fair dealing, I think the contest should be dismissed.

It has been urged that the case of *Linderman v. Wait*, decided on the 17th of May (6 L. D., 689), ought to be applied, and leave given to amend the original filing by the omission of a proportionable part of the quarter-section entry. I dissent entirely from that claim. The case of *Linderman v. Wait* was decided in the exercise of the power of amendment, which should be allowed in cases where, in sound discretion, the interest of justice requires it. As applied to timber-culture cases it ought to be allowed only where very considerable and substantial results have been accomplished by the entryman, in good faith, in securing a considerable growth of trees, and where the failure to make that growth extend to the full number of trees required to support the entry is excusable and unaccompanied by bad faith or gross neglect. If the default in this case were such as to require the entry to be canceled in whole or in part, it would be such also as to deny the exercise of the power of amendment.

HOMESTEAD ENTRY—RESIDENCE—PREFERENCE RIGHT.

MURPHY v. DE SHANE.

A homestead entry made while the entryman is residing upon another tract under the pre-emption law, for which final proof has not been submitted, is illegal and must be canceled.

The application of the claimant to relinquish and make new entry of the land must be denied on account of the adverse right of the successful contestant, but without prejudice to its renewal, if the contestant fails to exercise the preference right of entry within the statutory period, and no other rights intervene.

Secretary Vilas to Commissioner Stockslager, June 26, 1888.

The record in this case shows that on June 14, 1884, George DeShane filed declaratory statement for the SW. $\frac{1}{4}$ of Sec. 32, T. 29 S., R. 27 W., Garden City land district, Kansas, alleging settlement June 6th of the same year. That on October 7, 1884, he made homestead entry for the NE. $\frac{1}{4}$ of Sec. 31 of the same township and range.

On November 16, 1885, Lucy A. Murphy filed her affidavit of contest against said homestead entry, charging that the same was illegal, for the reason that said De Shane was, at the time of making said entry, living upon and claiming the tract covered by his pre-emption filing, upon which he had made final proof and obtained final receipt, June 2, 1885.

On November 21, 1885, the local officers, without notice to claimant of the filing of said affidavit of contest, transmitted the same to your office, and recommended that said entry be held for cancellation.

On December 21, 1885, your office held claimant's entry for cancellation, "with the usual time allowed the entryman in which to appeal, or show cause why the entry should not be canceled."

From this decision, instead of proceeding to "show cause why the entry should not be canceled," claimant appealed. He filed with his appeal his affidavit, duly corroborated, from which it is shown, among other things, that he made said homestead entry after being advised by one A. Bennett, a land attorney at Garden City, that he had a legal right to do so, and he believed he did have the right to make the same: that he made final proof upon his pre-emption June 2, 1885, and obtained his final receipt therefor; that he thereupon moved to his homestead, built a sod house thereon, fifteen by twenty feet, board roof, one window, one door, and fire place, and established his residence therein and has continuously resided on the land ever since; that he has broken thirty-eight acres of the tract, prepared the same for crop, and has raised thereon cane, corn, fodder, and two hundred and fifty tons of millet; that he took the tract for a permanent home, and has fenced in a portion thereof; that he never received any notice of the contest against his entry, or that he had no legal right thereto, until after the Commissioner's decision holding the same for cancellation, and that he had resided upon, cultivated and improved the land in entire good faith. He also asks, in effect, that he be permitted to relinquish said entry and allowed to make new entry for said tract.

It appears from the foregoing, that when claimant made his entry, he was residing on a pre-emption claim, on which he did not make final proof for over seven months thereafter, and the first question to be determined is, whether his entry was illegal in its inception, and should for that reason be canceled.

In the case of *Krichbaum v. Perry* (5 L. D., 403), it was held that this Department "has never recognized the right of a person to at the same time claim one tract as a pre-emptor and another as a homestead entryman, for the very good reason that both the pre-emption law and homestead law require residence, and a person cannot maintain two residences at one and the same time." See also *Collar v. Collar* (4 L. D., 26), and *Austin v. Norin* (ib., 461). In the case first above cited, it was further held that "while a homestead entryman is allowed six months within which to establish his actual residence upon the tract embraced in his entry, the law regards his residence as commencing from the date of his entry, and if it appears . . . that residence after that date was elsewhere, then clearly the homestead entry was illegal." To the same effect, see case of *J. J. Caward* (3 L. D., 505).

Applying to the case at bar the principles enunciated in foregoing authorities, it is clear that claimant's entry was illegal, and must therefore be canceled.

The application of claimant to relinquish and make new entry for the tract in question, cannot be allowed because the statute gives a prefer-

ence right of entry to the contestant Murphy; and the same is therefore denied, but without prejudice to its renewal if the contestant shall not exercise her right within the limited period, and no other rights shall intervene.

The decision of your office is accordingly affirmed.

PRACTICE—CONTEST—FINAL PROOF.

CLYMENA A. VAIL.

The rejection of commutation proof by the Commissioner, and pendency of appeal from such action, do not bar the institution of a contest against the original entry, where said entry was not held for cancellation by the Commissioner's decision.

Secretary Vilas to Commissioner Stockslager, June 29, 1888.

I have before me the appeal of Clymena A. Vail from your office decision of January 4, 1887, rejecting her final proof for the NE. $\frac{1}{4}$, Sec. 24, T. 32 S., R. 31 W., Garden City land district, Kansas.

Claimant made homestead entry of the said land April 15, 1885, and submitted her final commutation proof June 7, 1886. The local officers rejected the proof and your office, upon appeal, affirmed their decision, but allowed the claimant to submit new final proof within the lifetime of her entry.

After the appeal to this Department was filed, and during its pendency, June 18, 1887, one Charles W. Mosher instituted a contest against the entry of the claimant on the charge, that she had wholly abandoned said tract; that she had never established her residence thereon, since making said entry and that said tract was not settled upon and cultivated by the claimant as required by law.

The local officers entertaining said contest ordered a hearing for December 27, 1887. After a continuance, the case came up for trial March 6, 1888, when both parties being present, claimant, by her attorney, appeared specially to file and did file a motion to suspend action in the case, pending the said appeal from your office to this Department. The local officers granted the motion and ordered that further action in the case be so suspended. From this order contestant appealed and your office, without having rendered a decision therein, transmitted the record and papers regarding the appeal to this Department, and the same are now before me.

Inasmuch as your office held the original entry intact, there would seem to be no reason why the contest of Mosher should not proceed to a hearing. But the rule would have been different had the entry been held for cancellation by your decision; for in that event, to recognize the right of a contestant, would be practically to confer the preference right of entry upon one who had simply availed himself of the action already taken by the government.

You will therefore direct the local office to proceed with the hearing heretofore initiated before them; in the meantime action on the final proof of claimant will remain suspended.

AMENDMENT OF ENTRY—MORTGAGEE.

LEWIS W. CHASE.

On application to amend a pre-emption entry, the mortgagee of the entryman may be permitted, after due notice, to submit evidence showing that the final proof as made, did in fact apply to the land covered by the settlement of the pre-emptor, and not that embraced within the final certificate.

Secretary Vilas to Commissioner Stockslager, June 29, 1883.

I have before me the appeal of Lewis W. Chase, transferee of Fred. F. Frisbee. The latter filed his declaratory statement April 9, 1883, for SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ Sec. 5, N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ Sec. 8 and NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ Sec. 7, all in townships 35 N. range 10 W., Durango land district, Colorado, alleging settlement thereon August 2, 1882. He made his final proof December 6, 1884 and on the same day cash certificate No. 102 for the said lands was issued.

In September, 1885, Frisbee made application to your office to be allowed to amend his cash entry No. 102 so as to cover the E. $\frac{1}{2}$ of SW. $\frac{1}{4}$ and SW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ Sec. 5 and SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of Sec. 6 same town and range as aforesaid, because a mistake had been made in the description of the land upon which he settled and placed his improvements. One Aaron D. Steward, who had filed his declaratory statement on the last described lands, alleging settlement thereon May 1, 1885, protested, October 1885, against the allowance of the amendment asked by Frisbee. Your office, having considered the matter, by letter dated February 25, 1886, allowed Frisbee to re advertise and offer new proof for the land covered by his actual settlement; at the same time, your office returned to the local officers the said certificate, with the instruction, that the same should be amended in accordance with the facts after satisfactory new proof should have been furnished and accepted. Of this determination the attorney of Frisbee and the said Steward received notice March 8, 1886.

On April 5, 1886, one Lewis W. Chase made an application to your office, in which he set out, among other matters, that Frisbee, having become indebted to him in the sum of \$600, secured the payment of such indebtedness by executing to him, in December 1884, a mortgage for the said sum on the lands covered by said cash certificate; that after making proof and payment, Frisbee engaged in business at Durango and having become involved in debt, absconded and was last heard from at some point in the State of California; that the latter's residence was unknown and after diligent search and enquiry had not been ascertained. The said

applicant therefore prayed that, after notice duly published, he be allowed "to furnish all necessary proof for the correction of the before mentioned mistakes the same as Frisbee would have been compelled to do, if personally present."

Your office in letter, dated June 23, 1886, denying the application decided, "It is not the practice in this (your) office to recognize a mortgagee as the party for proving the fact of an error. The pre-emptor himself should appear, re-advertise and offer proof covering the tracts to which the entry is sought to be amended."

From this decision of your office Chase instituted an appeal and the same is now before me.

The fact that the claimant established a bona fide residence upon the land he desired to enter, and subsequently complied with the law thereon, does not seem to be questioned. If he were present he would be permitted to make the new proof, or rather to show that the proof submitted was intended to, and did, apply to the land covered by the proposed amendment, and not that actually entered. This being true I can see no good reason why the same privilege should not be extended to the mortgagee, after giving due notice as proposed by him in his application.

Your decision is accordingly reversed and said application allowed.



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If any authority exists in the executive branch of the government to declare a statute unconstitutional it should not be exercised except where the violation of fundamental law is so manifest as to overcome every presumption in its favor
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"Homestead laws" considered as a generic term, embracing other settlement laws.. 43

A changed construction of the law will not impair rights acquired under a former interpretation of the same law
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Survey.

See *Mining Claim, Private Claim, Railroad Grant.*

In closing must terminate at "the place of beginning"

If the call is plain, and no particular course is prescribed, a straight line must be adopted

Should be closed upon the lines of a complete grant

Application for, under the deposit system, signed by all the applicants, is sufficient under the law and regulations; each settler not being required to sign a separate application

The right to a, under the deposit system does not rest in the discretion of the Commissioner, but is a matter of right in the settlers whenever they have shown a full compliance with the law and regulations, and the township is within the range of the regular progress of public surveys

Not ordered of the former bed of a meandered lake

Meander lines, in the survey of land bordering upon a body of water, are run not as boundaries, but for the purpose of determining the quantity of land subject to sale

The boundary of a tract bordering upon a body of water is the water line; and a patent for a tract thus bounded conveys all the land included within the water line, though some portion thereof may be excluded by the meander line

Proprietors bordering on streams not navigable, unless restricted by the terms of their grant, hold to the center of the stream

Of an island not allowed where the title thereto appears to be in the applicant as riparian owner

Of an island, in a stream not navigable, denied, where *prima facie* the island belongs to the owner of the land on the nearest main shore, and such survey would be an interference with vested rights

Marsh lands excluded from original and subsequently reclaimed are subject to, under the regulations of July 13, 1874

The revocation of the circular of July 13, 1874, will not defeat rights acquired thereunder

In closing a system of surveys progressing from west to east upon another system extending from a different meridian, deficiencies may be deducted from the eastern range of sections

Surveyor-General.

See *Evidence, School Land, Swamp Land.*

Swamp Land.

Certification of, can not be revoked unless obtained by fraud or mistake

Specific charge that land was fraudulently returned as, will be investigated

Grant of, did not take effect on lands reserved to the government in reimbursement for lands granted by previous legislation; and, as such lands were not granted, indemnity therefor must be denied

Proceedings before the Surveyor-General under section 2488, R. S.

Timber Culture.

Circular of June 27, 1887 (approved July 12, 1887)

The orange may be regarded as a timber tree if grown for that purpose

The "breaking" required the first year is sufficient if the land is thereby rendered fit for cultivation "to crop or otherwise" the second year

Sowing tree seeds broadcast with grain is not a proper "planting"

Credit not allowed for breaking done by former entryman if such work has not been utilized by the claimant

A requirement that the proof should show that the trees after proper cultivation for the statutory period have attained a specific height or size is not warranted by law

Failure to secure required growth not sufficient ground in itself to warrant cancellation of entry on contest, such failure not being due to neglect of the entryman

The eight years of cultivation must be computed from the time when the required acreage of trees, seeds, or cuttings are planted

Timber and Stone Act.

Circular of May 21, 1887

Lands may be purchased by married woman who by laws of the State is recognized as a sole trader

Sale after entry does not show bad faith sufficient to justify cancellation

A tract of land containing patches of arable soil, which, however, aggregate a less quantity than those parts unfit for cultivation, is properly subject to entry under said act

Mesquite not regarded as timber

Recognizes the right to appropriate lands included within said act under the settlement laws

Alleged settlement rights on timber lands should be closely scrutinized

On application to purchase lands covered by prior pre-emption claim, the burden of proof is upon the applicant, to show the invalidity of said claim

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